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# REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

# SUPREME COURT OF TENNESSEE,

FOR THE

# MIDDLE DIVISION,

AT THE DECEMBER TERM,

1872-3.

---

EDITED BY

JERE BAXTER.

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**VOLUME II.**

NASHVILLE:
JAS. BROWNE, STEAM PRINTER, 32 NORTH COLLEGE ST.
1878.

Rec. Sept: 24, 1[illegible]

# PREFACE.

I would not deem it necessary to prepare a preface to this volume were it not encumbent upon me by this means to answer many questions which the unexpected publication of the Reports by myself has occasioned. It has been feared by some that subsequent Reports would be issued, republishing the same matter which I have reported. In answer, I have simply to say that this will not be the case, and should, at any time, a book appear entitled 10th Heiskell, it will contain other and different decisions entirely form those I have reported. In order, therefore, to preserve the chronology of the Reports, regardless of the editor's name upon the respective publications, I have placed upon each Volume a number, which corresponds with Judge Cooper's edition of the Tennessee Reports, the first which I have issued being 57, and the proper order of subsequent Reports can, therefore, be easily determined by the adoption of this style.

It should have been noted in the first Volume of my Reports that when the lamented Chief Justice Nicholson was disabled in 1873, by a fall, his Excellency, John C. Brown, commissioned John W. Burton, Esq., of Murfreesboro, to fill his place.

Judge Burton did supply his place from the 5th of January until the 5th of September of that year. This is mentioned to explain the fact that many of the opinions in the first, and also in the present Volume of my Reports, are delivered by Judge Burton.

The third Volume will be ready within the next sixty days.

JERE BAXTER.

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## ERRATA.

Page 17, read *audita querela*, for audita queralla.
Page 60, last line, read *personalty*, for property
Page 157, middle of page, read *just*, for first.
Pages 238-9, read *Sedg.*, for Ledg.
Page 277, six lines from top, read *was*, for owes.
Page 342, four lines 1 headnote, read *will*, for bill.
Page 279, opinion by Deaderick, Judge.
Page 441, five lines from top, read *competent* for incompetent.

# *CIRCUIT JUDGES*

## OF TENNESSEE.

---

J. A. McKinney,[1] 1st Circuit,.....Rogersville.
J. G. Rose,[2] 2d " .....Newport.
E. T. Hall, 3d " .....Knoxville.
J. B. Hoyle, 4th " .....Cleveland.
N. W. McConnell, 5th " .....Hartsville.
J. J. Williams,[3] 6th " .....Winchester.
W. H. Williamson, 7th " .....Lebanon.
N. Baxter, 8th " .....Nashville.
John. V. Wright, 9th " .....Columbia.
J. E. Rice, 10th " .....Clarksville.
T. P. Bateman, 11th " .....Savannah.
J. R. Hawkins, 12th " .....Huntingdon.
G. B. Black, 13th " .....Trenton.
T. J. Flippin, 14th " .....Somerville.
C. W. Heiskell, 15th " .....Memphis.
D. K. Young, 16th " .....Clinton.
J. C. Guild, L. Ct. of Nashville,[5] .....Nashville.
J. E. R. Ray, Pr. Ct., Shelby.....Memphis.
H. W. McCorry, L. & Ch. C. Ct. of Madison..Jackson.
C. W. Tyler, Co. & Cr. Ct. of Montgomery..Clarksville.
T. L. Logwood, Cr. Ct. of Shelby,[4] .....Memphis.
M. L. Hall, Cr. Ct. of Knox.....Knoxville.
T. N. Frazer, Cr. Ct. of Davidson & Rutherford, Nashville.
W. S. McLemore,[6] Cr. Cr. of Williamson,
Maury, Giles and Marshall.....Frankin.

---

[1]J. A. McKinney was elected Aug. 3, 1876, *vice* E. E. Gillenwaters, who died.

[2]J. G. Rose was elected Aug. 3, 1876, *vice* J. H. Randolph, who resigned.

[3]J. J. Williams was appointed July 2, 1877, *vice* W. P. Hickerson, who resigned.

[4]T. H. Logwood was elected Aug. 3. 1876, *vice* J. R. Flippin, who resigned.

[5]The "*Law Court of Nashville*" was abolished by the Act of March 22, 1877, ch. 42, to take effect the first Monday in May, 1878.

[6]The "*Criminal Court of Williamson, Maury, Giles and Marshall*" was abolished by the Act of March 26, 1877, ch. 145, to take effect the first of September, 1878.

# *ATTORNEYS GENERAL*

## OF TENNESSEE.

---

1st Circuit, N. HACKER,.....Jonesboro.
2d " P. G. FULKERSON,.....Tazewell.
3d " W. L. WELCKER,.....Loudon.
4th " S. J. A. FRAZIER,.....Washington.
5th " G. H. MORGAN,.....Gainesboro.
6th " J. D. TILLMAN,.....Fayetteville.
7th " M. W. MCKNIGHT,.....Woodbury.
8th " A. J. CALDWELL,.....Nashville.
9th " J. H. FUSSELL,.....Columbia.
10th " T. C. MULLIGAN,.....Gallatin.
11th " J. H. TAYLOR,.....Lexington.
12th " R. A. PIERCE,.....Union City.
13th " J. SKEFFINGTON,.....Dyersburg.
14th " J. J. DUPUY,.....Bolivar.
16th " J. M. D. MITCHELL,*.....Livingston.
L. E. WRIGHT, Cr. Ct.....Memphis.
B. D. JOHNSON, Cr. Ct.....Clarksville.
J. C. J. WILLIAMS, Cr. Ct.....Knoxville.
G. W. GORDON, Bartlett Court,.....Memphis.

---

*J. M. D. Mitchell was appointed Sept. 7, 1876, *vice* W. Cullom, who resigned.

# *JUDGES OF THE SUPREME COURT*

## OF TENNESSEE.

---

### MIDDLE DIVISION.

**PETER TURNEY.**

### EASTERN DIVISION.

**JAS. W. DEADERICK, Ch. J., R. McFARLAND.**

### WESTERN DIVISION.

**THOS. J. FREEMAN, J. L. T. SNEED.**

---

# *CLERKS OF THE SUPREME COURT*

## OF TENNESSEE.

---

J. F. DEADERICK,.....KNOXVILLE.
W. N. COWDEN,.....NASHVILLE.
JOHN H. FREEMAN,.....JACKSON.

---

### ATTORNEY GENERAL:

**JOSEPH B. HEISKELL,**

MEMPHIS, TENN.

# *CHANCELLORS*

## OF TENNESSEE.

---

| | | |
|---|---|---|
| H. C. Smith, | 1st Dist. | .....Elizabethton. |
| O. P. Temple, | 2d " | .....Knoxville. |
| W. M. Bradford, | 3d " | .....Athens. |
| A. S. Marks, | 4th " | .....Winchester. |
| W. G. Crowley, | 5th " | .....Smithville. |
| B. J. Tarver, | 6th " | .....Lebanon. |
| W. F. Cooper, | 7th " | .....Nashville. |
| W. S. Fleming, | 8th " | .....Columbia. |
| G. H. Nixon, | 9th " | .....Lawrenceburg. |
| H. J. Livingston, | 10th " | .....Brownsville. |
| J. Somers, | 11th " | .....Dresden. |
| R. J. Morgan, | 12th " | .....Memphis. |

# CASES

## ARGUED AND DETERMINED

IN THE

# SUPREME COURT OF TENNESSEE,

FOR THE

# MIDDLE DIVISION.

---

NASHVILLE,.....DECEMBER TERM, 1872.

---

MACON AND SMITH COUNTIES *v.* TROUSDALE COUNTY.

NEW COUNTIES. *Mode of measurement. Straight line rule adopted. Article 10, Sec. 4 of the Constitution, and ch. 27 of Act of Second Session of 1869-70, passed June 21, construed.* Where new counties are established, the straight line rule is adopted as the mode of laying them off, and ascertaining their proper measurements.

2. SAME. *Same.* The act of the Legislature, so far as it merely established the county of Trousdale, is valid; but so far as by the boundaries prescribed it has entrenched upon the counties of Macon and Smith, lessening their constitutional area, it is void.

Cases cited: Barron Martin's opinion in the case of Monflet *v.* Cole, determined in the English Court of Exchequer, is adopted by the Court. Many authorities are cited.

---

FROM MACON.

---

Appeal from the Chancery Court. W. D. GOODPASTURE, Chancellor.

Macon and Smith Counties *v.* Trousdale County.

JOHN W. HEAD & SONS for Trousdale County.

M. N. ALEXANDER for Macon County.

TURNEY, J., delivered the opinion of the Court.

Article 10, § 4, of the Constitution of the State ordains:

"New counties may be established by the Legislature," etc. After a general proviso there is, among exceptions, the following: "New counties may be established by the present or any succeeding Legislature, out of the following territory." . . . "Out of fractions of Sumner, Macon and Smith Counties, but no new line of such new county shall approach the Court-house of Sumner or Smith Counties nearer than ten miles, nor include any part of Macon County lying within nine and a half miles of the Court-house of said county, nor shall more than twenty square miles of Macon County, nor any part of Sumner County lying due west of the western boundary of Macon County be taken in the formation of said new county."

On June 21, 1870, the Legislature passed an Act establishing the county of Trousdale out of fractions of the counties of Sumner, Macon, Smith and Wilson, around the town of Hartsville, defining the boundaries. Ch. 27, Acts of Second Session 1869–70.

It is insisted this creating statute violates the clause of the Constitution already quoted, in taking more of the territory of Smith and Macon Counties than is granted.

In discussing and determining the question we are

to be understood as treating it as a political question, and not as one growing out of contracts between individuals. We are restricted to public policy, tested by the times in which we live. With the restriction indicated, as the reasoning is sound and the authorities conclusive, we quote and adopt the opinion of Baron Martin, in the case of *Monflet* v. *Cole*, determined in the English Court of Exchequer, in November, 1871, as follows:

"The question in this case is, in its terms, very simple. The plaintiff had bought from the defendant a public house called "The Lord Holland," and the defendant covenanted that he would not carry on the business of a publican within the distance of one half-mile of the premises called "The Lord Holland," and the question is, how the distance of half a mile is to be measured. The plaintiff contends that the true mode of measurement, that is, the true construction of the language used, is that a circle of half a mile radius is to be drawn round The Lord Holland, and that if the defendant carries on the business of a publican within this space, then he has broken the covenant. The defendant, on the other hand, contends that the true construction of the covenant is, that if there be a half mile between The Lord Holland and the house where the defendant carries on business, measured by the nearest way of access, there is no breach of the covenant.

Now if the question were new and had never before arisen, I think the plaintiff's contention is right.

Macon and Smith Counties *v.* Trousdale County.

Every written document is to be construed according to the ordinary natural and grammatical meaning of the language used, and when a man covenants that he will not do an act within a certain distance of a given spot, it seems to me that the true mode of determining the distance is to describe a circle with a radius of the distance around the spot, and that if the act be done within this circumscribed distance, the covenant is broken, and that it is an unnatural and unreasonable construction to say that the distance is to be measured by the *then existing way of access.* Supposing The Lord Holland was on the bank of a river fifty yards wide, and that the bridge across the river was upwards of a quarter of a mile from The Lord Holland, this construction of the covenant would enable the covenantor to set up a public house on the opposite bank within fifty yards of The Lord Holland. This, as it seems to me, would be in direct contravention both of the words and spirit of the covenant.

Again, supposing that by the existing mode of access the distance was upwards of half a mile, but by a new road the distance was reduced to less than a half mile, there would be no breach of the covenant until the new road was made, but there would be afterwards. I can not but think such a construction of the covenant would be unreasonable, giving it one operation in one state of things, and another in another; and if I had to decide the question independently of all authority, I would be of opinion

that the plaintiff's construction of the covenant would be the true one, and the more consistent with reason and certainty.

But in my judgment the authorities are conclusive. Passing over for the present the case of *Wing* v. *Earl*, the first case in order of time is *Wood* v. *Dennett*, and there Lord Ellenborough expressed his opinion at Nisi Prius that the nearest way of access was the proper mode of measurement. The next case was *Leigh* v. *Hind*. The covenant there was, that the defendant would not carry on the business of a victualler within the distance of half a mile of the premises assigned, a public house in Bishopgate street, in London. It was found by an arbitrator that the defendant carried on the business of victualler within half a mile by the nearest way of access, and of necessity within the radius of a half mile, and the unanimous judgment of the Court was that the covenant was broken, but Lord Tenterdon and Mr. Justice Littledale stated their opinion to be that the distance was to be measured by the nearest way of access, and Mr. Justice Littledale stated that if this covenantor took a public house, the distance of which by the then shortest way of access, was greater than the half mile, there would be no breach of covenant, but if a new street were opened, whereby the distance became less than a half mile, there would be a breach. On the other hand, Mr. Justice James Parke declares his dissent from this construction, and said he was of opinion that the proper mode of measuring the dis-

tance was by taking a straight line from house to house, or, as he expresses it, as the crow flies. He referred to the case of *Wood* v. *Dennett*, and there is no mistake or misunderstanding as to his opinion. Now these opinions were not necessary for the decision of the case; but they were the opinions of three of the most eminent Judges of modern times, and the present question is, which of them have been adopted in subsequent judgments. The question next arises in *Reg* v. *Inhabitants of Sappon Walden;* that decision was upon an enactment that no person should retain a settlement in a parish for any further time than he should inhabit within ten miles thereof. The case of *Leigh* v. *Hind* was cited; Lord Denman said the most reasonable rule was that approved of by Mr. Justice Parke, namely, a measurement by a direct line. He added, this would avoid the practical difficulty of a settlement being good one day and bad the next, or that there should be no breach one day and a breach the next. The next case is *Stokes* v. *Grissell.* The question there was, whether the plaintiff dwelt more than twenty miles from the defendant. Jarvis, C. J., stated his opinion to be that the proper measurement was on the horizontal plane from point to point, and not by road. Mr. Justice Maule stated that he agreed with Mr. Justice Parke in *Leigh* v. *Hind*, and that in his opinion, the proper mode of measuring was on a straight line from point to point, and that upon the question he entertained no doubt at all.

The next case is *Lake* v. *Butler*. The question was

whether the plaintiff dwelt more than twenty miles from the defendant, and Lord Campbell, Mr. Justice Earl and Mr. Justice Compton, expressed a clear opinion that the straight line and not the nearest way of access was the true mode of measurement. The next case is *Jewel* v. *Stead*. The question then arose upon an enactment that no toll-gate should be erected within three miles of another toll-gate called Bargate. The toll-gate was by the road more than three miles from Bargate, but by the straight line, less. Now here it might have been plausibly argued that the object of the Legislature was to protect the traveler from a second toll until he had traveled three miles of road, and that when he had traveled three miles the Legislature did not intend to prohibit a second toll, but the Court of Queen's Bench held that the straight line was the true measurement. These are the authorities in the courts of law, but there is a case in equity directly in point to the same effect—*Dingman* v. *Walker*. An attorney had covenanted not to carry on business within seven miles from the plaintiff's office, the question was raised, nearest way of access or straight line—and the present Lord Chancellor decided, apparently without doubt or difficulty, that the distance was to be measured in a straight line on a horizontal plane.

There was another case cited, *Wing* v. *Earl*. The defendant had sold the plaintiff wood, which was to be gotten four miles from Rye, in Sussex. The defendant pleaded that the wood, by the nearest and

usual highway, was four miles from Rye. The Court gave judgment for the plaintiff. Mr. Justice Fenner said that if the question had been upon a statute, the miles should be construed according to the usual way for carriages, but upon the condition which is the same as a covenant or contract, if it be in four miles in any way, the condition—in other words, the contract or covenant, is broken; this is in favor of plaintiff's contention." "My opinion is that the construction put upon the covenant by Mr. Justice Maule, is the correct one. All the subsequent authorities, without exception, adopt it; there is no authority to the contrary—at least none has been cited by the learned counsel for the defendant.

It was said that one construction was to be given to these words in an act of parliament, and another in a deed or contract. I should be very loth to do so. It may be that circumstances may exist in a peculiar case to justify such construction, but in my opinion there is nothing in this calling for it.

It was also stated that the measurement of straight line, as stated in some of the judgments, is not practicable.

"I have inquired as to this from one of the most competent persons in this kingdom, and have been informed that it may be easily measured with sufficient correctness for all practical purposes, by means of the Ordinance map."

We have cited, almost entire, the opinion of the Court in the case quoted, in order to give to the

profession all the authorities upon the question, *pro* and *con*, which have been collected at great labor, and for which the opinion is mainly valuable.

The question is a new one in this country, made perhaps for the first time in this case.

From the opinion quoted Cleasby, B., dissented. Taking the opinion of the Court and tempering it with the dissenting opinion, we think it peculiarly applicable to the case at bar.

The dissenting opinion takes a distinction, (for which many good reasons may be given,) between an act of parliament and an agreement between private parties. In criticising the cases cited, Cleasby, B., says: "In *Stokes* v. *Grissell* which was pressed on behalf of defendant, the question was, how the distance of twenty miles, mentioned in an act of parliament, was to be measured, and the case has no bearing upon the construction of an agreement like the present, when the subject-matter and intention of the parties must be considered."

In commenting on *Lake* v. *Butler*, he says: "The question was the same as in *Stokes* v. *Grissell*, viz., the measurement of twenty miles mentioned in 9 and 10 Vic. c. 95, and the Court adopted the view expressed in the former case; but there is nothing in the judgment indicating an opinion in favor of the straight line rule, in such a case as the present."

In noticing *Jewel* v. *Stead*, he says: "The question arose upon a turnpike act, which provided that no toll-gate should be erected within three miles of

another toll-gate, and all that was decided was that the general rule should be adhered to, that when in an act of parliament, distance is mentioned, generally without any other guide, the straight line rule is to be adopted. This is one of the cases in which Lord Campbell says that the distance is to be measured by a straight line on the horizontal plane. This measurement of distance on a horizontal plane is a proper mode of measurement, when you are laying down an arbitrary rule to determine whether a particular case comes within an act of parliament or not, there being no question of conduct and of liability by reason thereof; but when the whole question arises upon the conduct of the parties, such a rule, it is submitted, is wholly inapplicable," etc.

From these extracts we see there was no difference in opinion in the application of the straight line rule in the construction of acts of parliament, and that the whole difference is in applying it to contracts between individuals.

We are called upon to construe a provision of the Constitution, and to that we distinctly confine ourselves, adopting the straight line rule, intimating no opinion as to what should be the rule in contracts or agreements between persons.

We may add to the reasons contained in the authorities that the term "miles" used in the Constitution, derives some aid in the interpretation we have given from the term "square miles" used in the same instrument, the latter meaning an area which can

only be ascertained by the straight line measurement, and we infer the use of the two terms in the same instrument and same clause of the instrument must have an affinity of meaning.

Our conclusion is the more satisfactory in the fact of the spirit of improvement which prevails, developing each day turnpikes and railroads by which mountains are tunneled, hills leveled and low places raised, thereby shortening distances in every quarter with constantly increasing improvements in that direction, making the only safe and always certain and unchanging rule of measurement, the air line.

The act of the Legislature, so far as it merely established the county of Trousdale, is valid, but so far as by the boundaries prescribed it has entrenched upon the counties of Macon and Smith, lessening their constitutional area, it is void.

The causes will be remanded to their respective Chancery Courts, whence they come, that surveys may be made in accordance with the rule laid down in this opinion.

Joseph B. Childress *v.* Lewis B. Marks *et al.*

## JOSEPH B. CHILDRESS *v.* LEWIS B. MARKS *et al.*

1. EXECUTION. *May issue upon lost judgment without supplying it. When.* Where it appears in substance that a judgment was rendered, and it recites facts sufficient to give the Court jurisdiction, and the judgment has not been reversed and no proceedings are had to rehear the case upon its merits, alias execution may issue to enforce the same, though the record of the judgment be lost.

Case cited: Faust *v.* Echols, 4 Cold., 397.

2. APPEAL. *Bond. Evidence of its being granted. When.* The defendants sought to dismiss an appeal, from the Circuit to the Supreme Court, for want of evidence that it was granted; the language is, "which (appeal) is granted upon his giving bond and security for cost." A bond appears executed on the same day, certified as part of the record.

*Held*, The granting an appeal is a judicial act, but the bond is taken by the clerk, and we must take it that the bond was accepted, and therefore the appeal granted.

FROM GILES.

Appeal from the Circuit Court. HILARY WARD, Judge.

NATHAN ADAMS for Childress.

T. M. JONES for Marks *et al.*

MCFARLAND, J., delivered the opinion of the Court.

About the 3rd of April, 1861, Childress obtained a judgment by motion in the Circuit Court of Giles County, against W. T. Marks and his sureties, as constable, for failing to return an execution issued by a Justice of the Peace; afterwards the record book of

the Court containing the entry of the judgment was destroyed. On the 8th of December, 1865, upon motion of the plaintiff, an alias execution was awarded upon this judgment—the original execution having been returned unsatisfied. Thereupon the defendants presented their petition and obtained a writ of error *coram nobis*. They state that the alias execution was awarded without supplying the lost record of the judgment; that the judgment, if rendered, was a summary one; and rendered without notice to them; that they have a valid defence; that they were not legally bound as the securities of W. T. Marks.

In their assignment of errors, however, they make no question as to the correctness of such judgment, but assign as error that the order awarding the alias execution is erroneous, because there was no record of the judgment, and it does not recite sufficient facts to authorize the order.

The Circuit Judge referred the question to the clerk, who reported the fact that the judgment was rendered, and sets forth a substantial copy; this the Court adjudged was a substantial copy of the judgment, and ordered the same set up. Subsequently the Court quashed the alias execution and ordered an issue to be made to try the facts alleged in the petition.

The petitioners thereupon moved the Court to strike the cause from the docket, upon the ground that the judgment quashing the execution disposed of the entire case; this the Court refused, and ordered the peti-

tioners to assign errors. They assigned as errors, in substance, that the order awarding an alias execution was erroneous, it having been awarded without supplying the lost record of the judgment and without reciting the facts; they assigned no error as to the question of their liability or the merits of the judgment.

To this assignment the plaintiff demurred, at the next or a subsequent term; without disposing of this demurrer the Court dismissed the case from the docket, upon the ground that the judgment quashing the execution was final, and from this action of the Court the plaintiff has appealed. For the defendants it is insisted that the appeal should be dismissed, because it does not appear that the appeal was granted; the language is, "which (appeal) is granted him upon his giving bond and security for costs." A bond appears executed on the same day; the granting an appeal is a judicial act, but the bond is taken by the clerk, and we must take it that the bond was accepted, and therefore the appeal granted.

These proceedings are somewhat irregular, but as it appears in substance that this judgment was in fact rendered, and that it recites facts sufficient to give the Court jurisdiction, and as the judgment has not been reversed, and as the defendants in this proceeding do not seek to re-hear the case upon the merits, we hold that the plaintiff was entitled to his alias execution to enforce the same, notwithstanding the record of the judgment was lost. See *Faust* v. *Echols*, 4 Cold., 397.

The judgment will be reversed, with directions to the Court below to issue execution on the judgment.

## EZELL *v.* HOLLOWAY.

1. CERTIORARI. *Will not authorize a trial on merits. When.* A certiorari to quash a judgment, because obtained without service, will not authorize a trial on the merits.
2. SAME. *Warrant, proof of and its return prima facie sufficient.* The justice made affidavit that a warrant was returned before him, duly executed, upon which he rendered the judgment; this would throw the burden of disproving the service upon the petitioner.
3. SAME. *Same. Petition dismissed. When.* The petitioner, admitting that the judgment was, in fact, rendered, it was not error for the Court to dismiss the petition on proof of service.

Cases cited: Studdart *v.* Fowlkes, 2 Swan, 537; Nance *v.* Hicks, 1 Head, 624; Hicks *v.* Johnson, 3 Sneed, 326; Hollins *v.* Johnson, 3 Head, 346.

FROM GILES.

Appeal from the Circuit Court. JOHN C. WALKER, Judge.

N. ADAMS for Ezell.

T. M. and C. P. JONES for Holloway.

McFARLAND, J., delivered the opinion of the Court.

Holloway, on a petition, shows that an execution

had been issued against him by Frauthane, a Justice of the Peace, upon what purports to be a judgment rendered against the petitioner in favor of Ezell. It is alleged that petitioner was not served with process; that there is no record of such case in the Justice's office; also that he has no knowledge of any meritorious ground for the judgment. He prays that the execution and judgment be brought into the Circuit Court and quashed.

In the Circuit Court a motion was made to dismiss the petition. Upon the hearing of this motion, affidavits made by the plaintiff and by the Justice were read, showing the rendition of the judgment, and the loss or destruction of the Justice's papers. The petitioner agreed that the judgment had been rendered against him by the Justice, as alleged, and also agreed that the affidavits might be read as depositions, but objected to their competency; the Court being of opinion that process was served upon the petitioner, and that he was not entitled to have the judgment or execution quashed, sustained the motion to dismiss. The petitioner insisted upon his right to hear the cause upon its merits; this was refused, and judgment rendered for the plaintiff Ezell, for his debt, interest and cost. Holloway has appealed, and assigns for error, 1. That the motion to dismiss was not made at the first term. In a case where a certiorari is used as a substitute for an appeal, it has been repeatedly held that the motion to dismiss must be made at the first term after the opposing party has notice of the issu-

ance of the writs; if no such motion be made the cause stands for trial upon its merits.

In this cause the prayer of the petition is not to re-try the cause upon its merits, but to have the judgment and execution quashed, because there was no service of process upon him. The writ in this cause was not used as a substitute for an appeal, but as a substitute for the obsolete writ of *audita queralla.*

The petition might, perhaps, have been presented in a double aspect, but it was not. If it be conceded that in a case of this character the motion to dismiss must be made at the first term, still the failure to make the motion does not change the nature of the proceeding, as a motion by the petitioner to quash the judgment and execution, upon the ground that the judgment against him was void for want of legal notice, the object of the certiorari and supersedeas being to suspend the execution and bring the proceedings into Court for the purpose of making the motion.

The motion is triable by the Judge, unless he chose to submit some issue of fact to a jury. So in this case the question to be tried by the Court was whether the warrant of the Justice had been served upon the petitioner, he having admitted that the judgment was in fact rendered; this is the question the Court did try. The objection that this question was tried upon the motion of the plaintiff to dismiss the suits, when it should have been upon the petitioner's motion to quash, is more a matter of form than substance; in substance the proper question was decided, that is, that

the warrant was served upon the defendant, and therefore he was entitled to no relief. The failure of the plaintiff to move to dismiss at the first term could not avoid this question.

The authorities referred to 2 Swan, 527; 1 Head, 624; 3 Sneed, 326, holding that upon motion to dismiss for want of merits, or because there is not sufficient reason for not appealing, counter affidavits can not be heard, and are undoubtedly good authority. The affidavits in the cause were read, under the agreement, as depositions. Upon the question of fact before the Court, the affidavit of the Justice shows that a warrant was returned before him, duly executed, upon which he rendered the judgment in question. This, we think, would throw upon the defendant the burthen of disproving the service of the warrant upon him, which he did not do. We do not think the Court erred in refusing to try the case upon its merits, this was not the prayer of the petition. See 3 Head, 347.

We think there is no substantial error, and the judgment will be affirmed.

## G. W. Griffin and S. M. Woodward, Plaintiffs in Error, *v.* Wm. Simmons and Geo. Simmons, Executors of Geo. Simmons, deceased, Defendants in Error.

1. Pleading. *Plea. When bad.* To an action on a note a plea that "the consideration of the note sued on was notes of banks worth at the time not more than —— cents in the dollar."
*Held*, Bad.

2. Note. *Want of consideration.* When a note for $1,000 is given for depreciated paper of the same nominal value, there is not a "partial want" of consideration within the meaning of Section 1806 of the Code.

3. Same. *Inadequacy of consideration.* Inadequacy of consideration is distinguished from a total or partial want of consideration. In the absence of fraud the former is no defence to an action upon a contract; the latter is a defence, total or *pro tanto*, as the case may be.

4. Same. *Distinction between inadequacy and partial want of consideration illustrated.* When the note is not given upon any one consideration which, whether good or not, or whether it fail or not, goes to the whole note at the time it was made; but for two distinct and independent considerations, each going to distinct portions of the note, and one is a consideration which the law deems valid and sufficient to support a contract, and the other not, then the contract shall be apportioned.

Cases cited: Parson on Notes and Bills, vol. 1, p. 211, note 1; Parrish *v.* Stone, 14 Pick., 198; Chitty on Con., 29; Edwards on Bills and Notes, 318.

5. Evidence. *Admission. Not admissible. When.* The mere statements of a testator, as to what he was willing to receive on a note, is no discharge or release of any part of the same, and his executors are not bound, it being voluntary and without consideration.

Griffin *et al v.* Simmons *et al.*

Cases cited: Turley *v.* Evans, 3 Hum., 222; Nane *v.* Simpson, 5 Sneed, 612.

FROM FRANKLIN.

Appeal from the Circuit Court. WM. P. HICKERSON, Judge.

JOHN FRIZZELL for Griffin and Woodward.

COLYAR, MARKS and FITZPATRICK for Simmons.

BURTON, Special J., delivered the opinion of the Court.

The defendants in error sued the plaintiffs in error in the Circuit Court of Franklin county, on a note given to their testator for one thousand dollars, dated the 18th day of September, 1862, and due one day after date.

The defendants below, among other pleas not necessary to notice, plead that "the consideration of the note sued on was notes of banks worth at the time not more than —— cents on the dollar."

On motion of the plaintiffs below, this plea was stricken out by the Court, and this is the principal error complained of. The record does not disclose the particular ground or reason upon which his Honor acted in stricking out the plea. But from the arguments of counsel we gather that it is supposed by them that because the bank notes, in consideration of which the promissory note in suit was given, were greatly depreciated; there was, in consequence, a par-

tial want of consideration to support the note. The section 1806 of the Code is referred to, which provides, in substance, that the want or failure of consideration, in whole or in part, of a written contract, may be shown as a defense in whole or *pro tanto*, as the case may be, where action is brought by any party who is not an innocent holder of the paper.

This section of the Code, as we understand it, is hardly an innovation upon the rules of pleading, so far at least as it provides that a partial want of consideration may be given in evidence. It is held, both in England and America, that a partial want of consideration is a defense *pro tanto* to a note or bill. But in England it seems to have been held that a partial failure of consideration is no defense, even *pro tanto*, but the party was driven to a cross action.

The question recurs, then, whether this plea makes out a case of partial want of consideration. There is no allegation of fraud, or misrepresentation, or mistake, but the simple case made by the plea is, that the plaintiffs in error saw proper to give their note of one thousand dollars for depreciated paper of the same nominal value. Now there is a plain distinction, as we think, between mere inadequacy of consideration and a total or partial want of consideration. While it is true that every contract must be supported by a valuable consideration, it is not essential that the consideration should be adequate in point of actual value. The law having no means of deciding upon this matter, and it being considered unwise to interfere with

the facility of contracting, and the free exercise of the judgment and will of the parties, by not allowing them to be sole judges of the benefit to be derived from their bargains.

Even in equity, although a consideration is necessary, if the agreement be not under seal, inadequacy of consideration or value is, in general, of itself no ground for impeaching a contract. Chitty on Contracts, p. 29.

In Edwards on Bills and Promissory Notes, page 318, it is said there is a plain distinction between mere inadequacy and a total or partial failure of consideration. Inadequacy of consideration is not in itself any defense to an action on a bill or note. But a total failure or want of consideration is a perfect defense, and a partial failure, is a defense *pro tanto*. The distinction between inadequacy of value and partial failure, or want of consideration being, everywhere asserted, it is clearly illustrated, as we think, in a Massachusetts case, where the defense of a partial want of consideration was allowed. In delivering the opinion of the Court, Shaw, C. J., said: "The rule to be deduced from the cases seems to be this, that when the note is not given upon any *one* consideration which, whether good or not, whether it fail or not, goes to the *whole note* at the time it was made; but for two *distinct* and independent considerations, each going to a distinct portion of the note, and one is a consideration which the law deems valid and sufficient to support a contract and the other not,

then the contract shall be apportioned." Parsons on Notes and Bills, Vol. 1, p. 211, note 1, citing *Parrish* v. *Stone*, 14 Pick., 198. So, in the text: "If a note be given by a father to a son partly in payment for services and partly as a gratuity so far as it is given upon the latter ground, it is without consideration, and this will be a good defence."

In the case we are considering, the note was given upon one entire consideration—that is, one thousand dollars in depreciated bank paper—and this consideration went to the whole note at the time it was made. There was no consideration wholly valueless as to any part of the note. It is not therefore a case of partial want of consideration, but is a case where the consideration was not adequate in point of actual value to the note given by the plaintiffs in error to the testator of the defendants in error.

2. The remaining question is, whether His Honor, the Circuit Judge, erred in excluding evidence offered by the plaintiff in error, and this will best appear by stating the substance of the evidence offered.

1. By E. P. Anderson, that he heard the testator say, shortly before his death, to L. M. Woodward: "I have instructed the boys (meaning, no doubt, his executors nominated) to receive five hundred dollars and give up that note." Witness did not remember what kind of money he spoke of, and thinks he only said "dollars."

2. By T. C. Murrell they offered to prove that in his last sickness plaintiff's testator said that the

money he let plaintiffs in error have was worth at the time not more than fifty cents in the dollar, and he wanted fifty cents in the dollar collected.

3. S. M. Woodward, the plaintiff in error, was offered to prove that the testator told him that he only wanted half of the note with interest; that the money he let defendant (Griffin) have was depreciated, and he wouldn't have but half of the note.

We do not concede that His Honor, the Circuit Judge, erred in excluding this evidence. The mere statements of the testator as to what he was willing to receive was no discharge or release of any part of the note due him, nor was it an admission that only five hundred dollars was due him on this note. What he said could not be construed into a promise or agreement binding him or his executors in law, being voluntary and on no consideration. And we cannot see from the whole of this record that with this rejected testimony before them, the verdict of the jury could or ought to have been different. *Turnley* v. *Evans*, 3 Hum., 222; *Nane* v. *Simpson*, 5 Sneed, 612.

Upon the whole we see no reversible error in this record, and the judgment of the Circuit Court will be affirmed.

## BURDETT A. LEWIS *v.* W. W. WOODFOLK.

1. LEX LOCI CONTRACTUS. Whatever constitutes a good defence by the law of the place where a contract is made, or is to be performed, constitutes a good defence wherever the question may be litigated. The lex loci acts upon the right, and the lex fori upon the remedy.

   Cases cited: 2 Kent, 595, 600; Pickering & Fisk, 6 Vermont R., 102.

2. FRAUD. Fraud in the inception of a contract is fatal to its enforcement, wherever the same may be litigated.

3. SAME. *Same. In sale of land.* In the sale of land, if there be no ingredient of fraud, and the party has not secured himself by covenants, he has no remedy even on failure of title.

   Cases cited: 2 Kent, 622; Maney *v.* Porter, 3 Hum., 347.

4. NOTE. *Inadequacy of consideration.* Inadequacy of consideration, without warranty or fraud, is no defense to a promissory note.

5. RECOUPMENT. Recoupment is not a matter of set-off arising on an independent contract, but for the purpose of reducing the plaintiff's damages, because he has not complied with the cross obligations under the same contract.

   Cases cited: Sedg. Meas. Dam., 496.

6. SAME. *Fraudulent misrepresentations.* Damages may be recouped for the value, quality or quantity of land when sustained by fraudulent misrepresentations, if susceptible of computation.

   Cases cited: Sedg. Meas. Dam., 500, 519; Porter *v.* Woods, 3 Hum., 60; Grouch *v.* Miller, 5 Hum., 586; Allen *v.* McNew, 8 Hum., 46; N. & K. T. Co. *v.* Harris, 8 Hum., 558; Henning *v.* Vanhook, 8 Hum., 678.

7. SAME. *Cross-action.* This defense only exists when a cross-action could be maintained.

   Cases cited: 5 Ind., 176. Sedg. Meas. Dam., 496.

8. SALE OF LAND IN GROSS. *Law of Louisiana.* Where land is sold in gross no action can be maintained for a diminution of price on account of deficiency in quantity.

   Cases cited: Zevengue *v.* Williams, 15 Ann. Rep., 76; Barrow *v.* Miller, 16 Ann. Rep., 114; Walker's Dig., 405.

9. SAME. *Warranty. Eviction. Law of Louisiana.* Vendor of land is never liable until the vendee is evicted by some lawful authority.

B. A. Lewis *v.* W. W. Woodfolk.

Cases cited: Morris *v.* Kenton, 2 Ann. R., 722; Fletcher *v* Carilin *et al.*, 10 La. R., 120; 7 La. R., 286; 19 Mart., La. R., 235.

10. SUCCESSION. *Legal representatives of. Law of Louisiana.* An administrator with will annexed may sue and recover upon a note made "to the order of the legal representatives of the succession" of the testator.

Code, § 2,788.

11. CONFLICT OF LAWS. Laws of other States are presumed to be the same as that of the State where the suit is brought, until the contrary is shown.

Case cited: Wharton Cont. of Laws, § 780.

12. CONSTITUTIONAL LAW. *Comity of States.* A change in the organic law of Louisiana, which annuls contracts for the sale of slaves in said State prior to the making of such change, is unconstitutional and void, and will not be recognized in this State, as valid by the comity of States.

Case cited: White *v.* Hart, 13 Wal., 647-654; 6 Adolph.; 2 Ellis, 989; Marbury *v.* Madison, 1 Cr., 137; Calder *v.* Bull, 3 Dall., 386; Satterlie *v.* Wattison, 2 Pet., 380; *ex parte* Garland, 4 Wal., 399; Dodge *v* Woolsey, 18 How. U. S., 331; Union Bank *v.* The State, 9 Yerg., 495.

13. COMITY OF STATES. *How far the principle is to influence the Courts of other States.* The comity of States is not a positive rule of law; one State can not dictate to another how to construe a contract sought to be enforced in its limits. A reasonable limitation of the rule is, that no community shall suffer prejudice by its comity.

Cases Cited: Sto. Cont. of Laws, 7, 8, 18, 20, 22, 23, 36, § 244-5; 5 La. Rep., 295; Forbes *v.* Cochran, 2 B. & C., 448: Smith *v.* Godfrey, 8 Forbes, 382; Ohio Ins. Co. *v.* Edmondson, 5 La. R., 295.

14. WARRANTY OF TITLE. A warranty of title is a covenant that the title is then good in the warrantor, but is not an undertaking for the future against the *vis major* of the government, by which the then existing title might be destroyed.

15. ATTACHMENT. *Ancillary.* The form of the writ of attachment given in this case was only intended for cases of original attachment, and does not apply to ancillary attachments. Although the absence of proof of publication can not be held fatal to the proceeding, the attachment is void because it does not refer to, describe, and identify the suit, in aid of which it was issued, so as to show upon its face that it forms an adjunct of that particular suit.

B. A. Lewis *v.* W. W. Woodfolk.

Cases cited: Ingle *v.* McCurry, 1 Heisk., 26; Woodfolk *v.* Whitworth, 5 Cold., 565; Thompson *v.* Carper, 11 Hum., 545. Code, § 3475.

FROM DAVIDSON.

Appeal from the Circuit Court. EUGENE CARY, Judge.

J. C. and J. M. GAUT, W. F. COOPER and JOHN C. THOMPSON for Lewis.

GUILD & SMITH, D. CAMPBELL and M. M. BRIEN, for Woodfolk.

SNEED, Judge, delivered the opinion of the Court.

The plaintiff, Burdett Ashton Lewis, as the administrator of Wm. W. Wilkins, deceased, brought this action in the Circuit Court of Davidson County against the defendant, upon the several promissory notes executed by the defendant on the 10th day of January, 1860, and due and payable at one, two and three years from date, each for the sum of thirteen thousand five hundred and fifty dollars. In the Court below the verdict and judgment were against the defendant, from which he has appealed in error.

These notes were in the form following, and only varying in time of maturity:

"$13,550. ASHTON, LA., CARROLL PARISH, January, 10, 1860.

"On the 10th day of January, A. D., 1861, I promise to pay to the order of the legal representatives of the succession of William Webb Wilkins, the sum

of thirteen thousand five hundred and fifty dollars, for value received, with six per cent. per annum interest, from date until maturity, and in case of default, with eight per cent. afterwards till paid; payable at the Citizens' Bank of Louisiana, New Orleans. B. C., due 10th and 13th January, 1861.

"Wm. W. WOODFOLK.

"Indorsed across the face, '*Ne varietur*,' Parish of Carroll, La., Jan. 10th, 1860.

"J. W. DRAUGHES, Recorder."

For the proper apprehension of some of the defences relied on, it is necessary to state that William Webb Wilkins died in the county of Henrico, and State of Virginia, leaving a last will and testament, in which his property was devised and bequeathed to his widow and children, some of the latter being minors. This will was duly proven and recorded in said county of Henrico, and the executor therein named having renounced the trust, the plaintiff, Burdett Ashton Lewis, was duly appointed and qualified as the administrator of said estate, with the will annexed.

At the time of his death, William Webb Wilkins was the owner of one-third interest in two plantations, with a large number of slaves upon each—the one called Welton, in the Parish of St. James, and the other called Ashton, in the Parish of Carroll, and State of Louisiana. This property he owned as tenant, in common with James A. Seddon and James

M. Morson, each owning one-third interest. These two plantations were, at the time of the testator's death, in operation for the benefit of the three owners, each of whom resided in the State of Virginia. Upon the death of William Webb Wilkins, it was thought expedient, by all parties in interest, who were *sui juris*, that this property in Louisiana should be sold for partition, and it was so agreed and determined. The widow and other devisees and legatees under the will, and the guardian of the minor heirs and legatees of William Webb Wilkins, thereupon executed to the plaintiff a power of attorney, conferring upon him full and ample authority to proceed to the State of Louisiana, and effect said sale, with a view to transfer the interest of said parties to the State of Virginia, where they were domiciled, thereby, in the language of said instrument, "authorizing our said attorney for us, and in our name, to ask, demand, take possession of and receive all and singular the property and estate, real and personal, movable and immovable, rights and credits, belonging or in any manner appertaining to the estate and succession of said deceased W. W. Wilkins, in the State of Louisiana, whether held and owned by said deceased individually or in partnership with others, to take all necessary and legal measures for the sale and disposal of the estate of said deceased W. W. Wilkins, in said State of Louisiana, whether by public or by private sale, or in accordance with the stipulations of any partnership articles which may

have been entered into by said deceased, to receive the price of such sale, whether in cash or notes, and grant receipt and acquittance therefor, to institute or defend any partition suits that may be necessary for the purpose of effecting a settlement and liquidation of the succession of said deceased, and, in general, to do all that is proper and necessary for the purpose of converting the property of said estate in Louisiana into cash or notes, so that the proceeds may be brought to Virginia for distribution amongst us, according to the provision of the will of said deceased."

In pursuance of this authority, the plaintiff proceeded to the State of Louisiana, where, upon an appropriate judicial proceeding, the said last will and testament was "ordered to be registered and executed according to law." A proceeding was thereupon instituted in the Courts of Louisiana, on behalf of the legatees and devisees of William Webb Wilkins, in which the said Seddon and Morson joined and concurred for the sale of said property, which was accordingly sold. In reference to this proceeding, a full and certified transcript whereof is before us, it is only necessary to say that, for the purposes of this case, it must be taken as valid, regular and conclusive upon the parties, as its validity has never been impeached in any appropriate form or forms of proceeding; that it stands in full force upon the judicial records of the State of Louisiana, and is entitled to "full faith and credit" in the Courts of this State. At the sale of the Ashton estate the land,

slaves, stock and provisions were all sold in bulk, at public auction, to the highest bidder, and defendant became the purchaser, at the price of $162,600, of which he paid one-fourth in cash, and for the deferred payments he executed his nine several promissory notes, for equal amounts, three of which were payable to the said James A. Seddon, three to James M. Morson, and three to "the legal representatives of the succession of William Webb Wilkins," the latter being the notes now in controversy. In said sale a lien was retained upon all the property, to secure the unpaid purchase money, and no warranty given except as to title in the slaves. The Sheriff, who sold the property under the orders of the Court, executed to defendant a deed to the whole estate, consisting of the Ashton plantation, described in said deed as the cotton plantation, known as Ashton, in the Parish of Carroll, Louisiana, fronting near a mile on the Mississippi river, running back, almost a parallelogram, about three miles, to and upon bayou Macon, bounded on the north by the Arkansas line, on the south by the bayou Macon road, containing, by estimation, about eighteen hundred acres, more or less.

The deed also names the slaves, ninety-eight in number, thus sold, giving their ages respectively, and mentions the personal property, consisting of mules, horses, and other live stock, provisions, and agricultural implements, all of which property, movable and immovable, was sold in bulk, as a whole, and bought by the defendant, who was placed in possession, and

has held the same, undisturbed, up to this time, except the slaves, which were lost by the events of the late civil war. The deed concludes with the clause following:

"Now, in order to secure the full, final and punctual payment of each and all of said notes, and all interest, cost and charges that may accrue on the same, according to their tenor, and according to the true interest and meaning of this act, the said Wm. W. Woodfolk hereby expressly declares that he did and does hereby specially affect mortgage and hypothecate all of the foregoing described property, hereby binding himself not to sell, mortgage, donate, alienate, or in any other way encumber the said property to the prejudice of this act of mortgage."

And it recites also, in another clause, the fact of the vendor's privilege and special mortgage thus reserved and given on the land and slaves, with no warranty of the slaves, except as to title. This deed was signed by the Sheriff, and by the defendant also, and was executed and delivered as an "authentic act," according to the laws of Louisiana, and was duly recorded in the Recorder's office, in the said Parish of Carroll.

The "Wilton" estate was sold under the same proceeding, during the following month, and was purchased by the surviving partners, Seddon and Morson, who paid the cash payment due to the succession of Wilkins to the plaintiff, and delivered to him the notes for the payments deferred, which payment and

delivery were recognized in the judicial records of the Fourth Judicial District. Court for the Parish of St. James, in the words following: "Which notes, after having been signed '*ne varietur*,' by the Parish Recorder for identification with the said process verbal of sale, were delivered to B. Ashton Lewis, attorney in fact, and legal representative of the heirs of the late W. W. Wilkins, who hereby acknowledges the receipt thereof, as well as the sum of twenty-seven thousand five hundred dollars, being the cash payment."

It appears in proof that the defendant owned a plantation very near to Ashton; that he examined things at Ashton very often, and it was well known long before the sale that he would be a bidder. A witness states that, on the day of sale, the negroes bought by the defendant were all present in a row. The Sheriff explained that it was a Sheriff's sale for division, by order of Court; that persons or purchasers must look at and examine the property for themselves; that no warranty would be given, except as to title; that the sale would be of all the property then present "in bulk;" that the advertised list of negroes was not accurate, but the negroes to be sold were all present, and could then be examined. "I saw Mr. Woodfolk," continues the witness, "walking among, talking with, and examining the negroes. The bidding soon commenced, and the property was cried off to Mr. Woodfolk. I, very soon after the deed was read and signed, left the place and returned

to my office. Mr. Woodfolk afterwards frequently spoke to me about his purchase, and expressed himself as very much pleased, and engaged me as his agent and physician. I never heard a word about his not liking the place or his purchase, or having any cause of complaint, until his notes for the credit payments became due. When the political trouble, after the election of Mr. Lincoln, depressed property, and made money scarce, and not until then did he make any complaint, and then he started a variety of complaints, and refused to make any payment on his notes. I know that he knew about the negroes he was buying, both as to their number and their qualities, and expressed to me his satisfaction after the sale."

The Recorder, who passed the deed to the defendant, testifies as to the perfect regularity of all the proceedings, and states that the clause, *de non aliendo*, in the deed, only prevented a sale of the property by defendant to the prejudice of the sellers; that he could always sell, but in the sale must provide for the payment of what he owed on the property; and indeed, in the opinion of the Court, such would necessarily be the legal construction of the instrument. This witness also says:

"I recollect distinctly that Mr. Lewis, the administrator, explained to Mr. Woodfolk that there were three slaves on the list sold in bulk, that were not on the place, but that there were others, not on the list, to a sufficient number, that would amply supply

their places. The negroes were drawn up in a line, and were carefully inspected by Mr. Woodfolk, who expressed himself not only entirely satisfied, but very much pleased. All the defects that any of said negroes had, were carefully explained to him, and he expressed himself delighted with his bargain, after the sale was over."

Another witness states that he was the overseer and manager of the Ashton estate at the time, and had been for a dozen years. "The sale was at a time when cotton property was thought very highly of. The defendant had a plantation very near. He talked to me about buying the Ashton estate a great deal more than to anybody else. He visited the place many times. He measured carefully, with surveyors' instruments, the different portions of the place, to ascertain for himself how much was cleared, and how much was wood-land. He looked at the negroes many times. He talked with me and with them about the quality of different ones. He talked with them about what they could do, about their disposition to be bought by him; and he acquired as perfect a knowledge of the land and negroes, and the other property on the place, as he well could do, and when the sale took place, on the 10th of January, 1860, he knew more about the place than anybody, but myself, and a great deal more than any of the proprietors, who all lived in Virginia."

Mr. Seddon had instructed the witness to bid for the place for himself and Mr. Morson, and he did so,

and afterwards offered, under the discretionary authority conferred by Mr. Seddon, to take the purchase off of defendant's hands, but he declined. He conversed with this witness about the purchase, and seemed to be entirely satisfied. He stated to witness that he had been offered twenty-five thousand dollars for his bargain, but said he would not sell, except for a great deal more than that. This witness further testifies as follows:

"Before the sale, when I saw the advertisement, I observed the names of Mary, Anny and Fanny upon it. These women had been sent, long before, to another place of the same proprietors; but others had been brought from that place to Ashton. The negroes at Ashton were more in number than were advertised. I explained the matter before the sale, and Mr. Woodfolk knew all about it when he bought; knew what negroes he was buying, and got what he bought, and was very much pleased, until the great fall in property, when the troubles began in 1861. Zenar, or Lizzena, was sold and delivered."

In the original petition for the sale, as presented to the Court, there is a general description of the various tracts comprising the "Ashton land," and among others, is the southwest quarter of section 10, Town 23, Range 12, east, as containing one hundred and fifty-one and fifty-six one hundredths acres, purchased by the said firm of Morson, Seddon and Wilkins, of Hypolite Pargond, by act of sale passed in the city of New Orleans, before Hilary B. Cenas, a

Notary of that city, 20th June, 1857, but which the said Morson, Seddon and Wilkins have agreed to exchange with William Cloman, for the southwest half of section 9, in Town 23, Range 12, east, as will appear by a contract under seal, signed by said Wm. Cloman, and Morson, Seddon and Wilkins, represented by James M. Morson and William Webb Wilkins, now deceased, in pursuance of which contract the said Cloman has tendered a deed for the land, which he is to give in exchange. The said southwest quarter of section 10, in Town 23, Range 12, east, is held by petitioners, and the said devisees of the said decedent, Wilkins, subject to the said contract of exchange with the said Cloman, and the said Cloman's rights under the same."

The defendant introduced upon the trial a plot of the lands constituting the "Ashton estate," and proved that the half of section 10, and the quarter of section 9, are both upon said plot, included within the boundaries of the Ashton estate; and that this plot was exhibited at the sale as a description of the lands; that the half of section 9 was owned by Cloman, and was to be exchanged for the southwest quarter of section 10; that the latter is better land than the half of section 9, one acre of it being worth two of the half of section 9. It was shown in defendant's testimony also, that several of the negroes were unsound; and the pecuniary damage to defendant by such unsoundness was also shown; and it was also shown that, during the late civil war,

the defendant had removed all of said slaves to the State of Arkansas. A witness was interrogated by defendant as to the value of certain slaves he had never seen, upon the hypothesis of their soundness, which was objected to by the plaintiff, and the objection sustained, to which defendant excepted. The same witness was, however, recalled, and the same testimony, in substance, elicited, in another form and without objection. The defendant read to the jury the clause of the Constitution of Louisiana of 1864, abolishing slavery in that State, and also submitted, as matter of evidence, the Constitution of 1868, containing the provision that "Contracts for the sale of persons are null and void, and shall not be enforced by the Courts of this State."

We have thus stated all the facts necessary to be considered in disposing of the several legal questions presented in the views we have taken of the case. And here, at the threshold, we had as well dispose at once of all defences which have for their foundation the existence or hypothesis of fraud or misrepresentation in these transactions. For it is certainly true, that if fraud had intervened to the defendant's injury, the law will interpose for his indemnity in this litigation, to the uttermost farthing of the damage done. And if this element does not exist in the case, it is equally clear that he must stand or fall upon the contract he has made, and upon the principles of law by which that contract is to be construed and expounded. It is a fundamental rule of

our jurisprudence that whatever constitutes a good defence by the law of the place where the contract is made, or is to be performed, is equally good in every other place where the question may be agitated. And while the question as to what appropriately belongs to the contract itself, and what to the remedy, is not always a question of easy solution, yet the rule has become a part of the *jus gentium*, among civilized nations, that the *lex loci* acts upon the right, and the *lex fori* upon the remedy. 2 Kent, 595, 600; *Pickering* v. *Fisk*, 6 Verm. R., 102. But, independent of these technical rules, the element of fraud in the inception of the contract inheres in it as a morbid and chronic disease, and upon the principles of morality, would be fatal to its enforcement anywhere. It was the technical rule of the common law, as stated by Chancellor Kent, that in the sale of land, the party was remitted back to the covenants of his deed; and if there be no ingredient of fraud in the case, and the party has not had the precaution to secure himself by covenants, he has no remedy for his money, even on failure of title. 2 Kent, 622; *Maney* v. *Porter*, 3 Hum., 347. And it is well settled everywhere that mere inadequacy of consideration, without warranty or fraud, is no defence to a promissory note. The contract in this case was made in Louisiana, which is the place indicated for its performance also. The defences which would have been availing in that State, if the remedy had been sought there, must be good here also, if they be such

as would be recognized as valid by the supreme law of the land. The defendant claims that he was overreached and defrauded in this transaction, by the representation that a small tract of land comprised a part of the Ashton estate bought by him, when in fact it was owned and claimed by another; that four slaves were represented to be of the number sold, when in fact they were not included, and that certain of the slaves actually bought were unsound; and upon these grounds he bases his demand in part for an abatement of the plaintiff's recovery.

We are of opinion that, upon these grounds, the defendant has failed to make out his defence. The defence under the doctrine of recoupment is well recognized in this State. It was originally a right of reduction from the amount of the plaintiff's recovery, on the ground that his damages were not really as great as he alleged. The modern defence of recoupment is not presented as a matter of set-off, arising on an independent contract; but for the purpose of reducing the plaintiff's damages, because he has not complied with the cross-obligations arising under the same contract. Sedg. Meas. Damages, 496.

It seems to be well settled that the defendant may recoup the damage sustained by the fraudulent misrepresentations of the plaintiff as to the value, quality or quantity of land, if such damage be susceptible of computation. And the doctrine has sprung from the policy of the law in adjusting all controversies between the same parties in one suit. Sedg.

Meas. Damages, 500, 519; 3 Hum., 60; 5 Hum., 586; 8 Hum., 46, 558, 678. But this defence only exists where a cross-action would be maintained. *Clark* v. *Wildridge*, 5 Ind., 176; Sedg. Meas. Dam., 496.

The record fails to disclose any misrepresentation in this case as to the Cloman land, or that plaintiff in error is likely to be disturbed in the possession of an acre of the Ashton plantation as bought by him. The sale was in gross, and not by the acre, and the estimate, 1800 acres, "more or less," under general, and not specific boundaries. It was a sale *per aversionem*, as it is denominated in Louisiana. And according to the law of that State, "when the land sold is described in the act of sale, by reference to adjoining tenants, and sold from boundary to boundary, no action can be maintained for a diminution of price, on account of deficiency in quantity." *Zevengue* v. *Williams*, 15 Ann. R., 76; *Barrow* v. *Miller*, 26 Ann. R., 114; Walk. Dig., 405.

But this defence may be disposed of on other and different grounds. There being no eviction, no misrepresentation, and no proof before us upon which any Court could act, that the defendant is not now in the actual enjoyment of the Ashton estate as described in the petition for a sale, wherein the exact status of this Cloman fraction was especially given, we see no ground upon which a claim to recoupment could rest. And in respect to the necessity for an eviction, even where there is a warranty, we do not

understand that the laws of Louisiana differ materially from our own. The eviction under the Code of that State is the loss suffered by the buyer of the totality of the thing sold, or of a part thereof occasioned by the right or claims of a third person. Code of La., Art. 2476. Although, at the time of the sale, no stipulations have been made respecting the warranty; the seller is obliged, of course, to warrant the buyer against the eviction suffered by him of the totality or part of the thing sold. Art. 2477. That the warranty should have existence, it is necessary that the right of the person evicting shall have existed before the sale. Art. 2478; 1 Ann. R., 200. But the parties may add to or diminish the effect of the warranty, and they may agree that the seller shall not be subject to any warranty. Art. 2479. In this case there was no stipulation whatever as to warranty in regard to the land, and the warranty as to the slaves was only as to title. But under the laws of Louisiana it is held that the vendor is never liable until the vendee is evicted by some lawful authority. *Morris* v. *Kenton*, 2 Ann. R., 722. And again, the warrantor is not to be called on to reimburse until judgment of eviction has had its effect against the party evicted. *Fletcher* v. *Carilin et al.*, 10 La. R., 120; 7 La. R., 286. And again, in the case of *Brown* v. *Reeves*, it was held that so long as the buyer is in peaceable and undisturbed possession of the thing sold, he can not withhold payment on the plea of a want of title in the vendor. 19 Mart.

La. R., 235. In any view of this branch of the case, therefore, we think the defendant has failed to show any ground that would authorize an abatement of the plaintiff's claim. In regard to the question of fraud in the sale of the slaves, it is sufficient to say that upon the proof it has no foundation, and in the absence of any warranty as to the soundness of any one of the slaves, this whole defence must fall to the ground. It is needless to elaborate this branch of the case further; but it is proper to say that, after a very careful examination of the evidence, we are unable to find the slightest foundation to impeach the sale of this property, or any part of it, upon the ground of any irregularity to the judicial proceeding, or any want of the most perfect good faith, either in the vendors or their agents in the transaction.

And all these questions were fairly submitted to a jury upon a correct charge of the law, and we see no reason to question the correctness of their verdict. But other questions remain. It is insisted on behalf of the defendant that this action can not be maintained by the plaintiff as the legal representative of the succession of William Webb Wilkins; that he is, in fact, not the payee of the notes under the laws of Louisiana. The declaration is in the name of Burdett Ashton Lewis, administrator, with the will annexed, of William Webb Wilkins, and recites the execution of the notes; that they were payable to the legal representatives of the succession of Wm.

Webb Wilkins, and their delivery to the plaintiff, whereby the defendant then and there became liable to pay to the plaintiff the said sums of money in the notes specified according to the tenor and effect thereof. The declaration is sufficient on its face to charge the defendant. Without considering the question upon the effect of our statutes, as to the propriety of a sworn plea to raise this issue, we hold that the plaintiff is, in law and in fact, the legal representative of the succession of Wm. Webb Wilkins. The word "succession," under the laws of Louisiana, means "the transmission of rights and obligations of the deceased to the heirs." Code, Art. 867. But the word under the same Code has another and a more general meaning. It signifies the "estate, rights and charges a person leaves after death." Art. 868, and in this last sense can not be distinguished from an estate as understood by our laws. The Code of Louisiana uses the words "representative of succession" as referable to the office of administrator. Code of La., Revisal of 1856, 3, § 6; Rev. 1870, §§ 1467, 1468, 3712, 3577, 3810. If, then, the word "succession" means the "estate," although it may have other meanings, yet under the law of that State, it would be no strained construction to hold that the representative of a succession, as the terms are used in these notes, mean the representative or administrator of the estate in the sense of our own laws. And it is the general rule to hold that the law of another State is the same as that of the State in which the suit

is brought, until the contrary be shown. Whart. Conf't. Laws, § 780. But in either sense of the term the plaintiff was, at the time of the execution and delivery of these notes to him, as a matter of fact, the legal representative of the succession of Wm. Webb Wilkins, whether as the representative of the instituted heirs under his power of attorney, or as the administrator representing the estate, and he was recognized as such by the Courts of Louisiana, and designated upon the records of the Court in St. James Parish as "the legal representative of the heirs of Wm. Webb Wilkins," to whom, as such, the notes were delivered.

We are of the opinion that, for the purposes of this action, the plaintiff is the legal representative of the succesion of Wm. Webb Wilkins. In any view, the objection is more formal than substantial, and relates more to the remedy than the right. Under the power of attorney he had a right to demand and receive, the notes as the representative of his constituents, who were the instituted heirs of the succession of Wm. Webb Wilkins. The transaction was for the purpose of transferring the estate to Virginia, where he was technically its legal representative. The notes were delivered to him as such, and he was described as such, and as such was recognized by the Courts of that State. He is the holder of the notes, and has deraigned his right to hold them, through his power of attorney and the judicial record from Louisiana; and this being so, he

has a right to sue under our statute in the name or description used in the instrument. Code of Tenn., § 2788.

Another defence relied upon, and which arises upon the pleadings is, that so far as the slave property is concerned, the consideration of these notes has totally failed, by reason of the abolition of slavery. A clause of the Constitution of Louisiana and certain judicial rulings of that State are relied on to defeat this action to the extent of the value of these slaves, the effect of which is, that contracts of this nature can not be enforced in the Courts of Louisiana. We might very summarily dispose of this defence upon the ground that prior to this change in the fundamental law of Louisiana, the defendant had voluntarily changed the legal status of this property by its removal to another State, where it, in fact, perished upon his hands, and that by this conversion of the property, his own legal obligations in regard to it were also changed; but without reference to that view of it, we think the adjudication of this question against the defendant may safely repose upon another and different ground. Under the repeated adjudications of this Court as to contracts of this character, made in this State, such a defence is unavailing. Our Courts having recognized in its fullest extent the maxim drawn from the civil law, that "after the bargain is completed, the purchaser stands to all losses," *res perit suo domino.*

We have already stated the general principle, that

whatever constitutes a good defence in the State where the contract is made or to be performed, is equally good in the State where the contract is litigated, with the important qualification that such defence is consistent with the paramount law of the land. The paramount law of the land in this country is the Constitution of the United States, and the law made in pursuance thereof, and the treaties made, or which shall be made, under the authority of the same, and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding. Const. U. S., Art. 6, § 2. And "whether the State law is organic in its Constitution or any ordinance, or whether it be a statute, if it violate the Constitution, laws, or a treaty of the United States, it is simply void, and the Courts of every State are bound by the Supreme law, and not by the State law." *Marbury* v. *Madison*, 1 Cr., 137; *Calder* v. *Bull*, 3 Dall., 386; *Satterlie* v. *Wattison*, 2 Pet., 380; ex parte *Garland*, 4 Wal., 399. The obligation of a contract can no more be impaired by the Constitution of a State than by an act of its Legislature. *Dodge* v. *Woolsey*, 18 How. U. S., 331. And so it was held by this Court that "a convention of a State has no power to violate contracts more than an ordinary Legislature." If it had, there would be no safety in times of excitement, under our form of government, for the most sacred rights. *Union Bank* v. *The State*, 9 Yerg., 495.

With these principles in view, we come now to consider to what extent the Courts of States will enforce the general doctrine stated, that a defence good under the *lex contractus* will be good under the *lex fori*, with reference to the complications of the case in judgment. We do not understand this rule to be matter of positive law, for it is certainly a sound principle in the abstract, that one State can not dictate to another how to construe a contract sought to be enforced in its Courts. The doctrine rests upon comity, and not upon positive law. "Every independent community," says Mr. Story, "will and ought to judge for itself how far that comity ought to extend. The reasonable limitation is that it shall not suffer prejudice by its comity." Story Conf't. Laws, § 244.

In a case in Louisiana it was said that, by the comity of nations, a practice has been adopted by which Courts of Justice examine into and enforce contracts from other States, and carry them into effect according to the laws of the place where the transaction took place. "It is subject to the exception that the contract to which aid is required should not, either in itself or in the means used to give it effect, work an injury to the inhabitants of the country where it is attempted to be enforced." *Ohio Ins. Co.* v. *Edmondson*, 5 La. R., 295. "In cases turning," said Mr. Justice Bart, "upon the comity of nations, *comitas inter communitates*, it is a maxim that the comity can not prevail in cases where it violates

the law of our own country, or the law of nature, or the law of God. Contracts, therefore," he concludes, "which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects—contracts against good morals, or against religion, or against public rights, and contracts opposed to the national policy or national institutions, are deemed *nullities* in every country affected by such considerations, although they may be valid by the law of the place where made." *Forbes* v. *Cochran*, 2 B. & C., 448; *Smith* v. *Godfrey*, 8 Forbes, 382; Story Conf't. L., §§ 244–5. These exceptions, it is said, result from the consideration that the authority of the acts and contracts done in other States, as well as the law by which they are regulated, are not *proprio vigore*, of any efficacy beyond the territories of that State; and whatever effect is attributed to them elsewhere is from comity, and not of strict right. Story Conf't. L., §§ 7, 8, 18, 20, 22, 23, 36, 244.

Now the change in the organic law of Louisiana, which in its terms annuls and destroys this contract and forbids any remedy for its enforcement in that State, was effected long after this contract was made. At the time of the contract, and according to the *lex loci* at that time, the contract was a valid and binding obligation to pay for these slaves. There was a warranty then of the title, that the title was then good in these vendors; there was no warranty against the *vis major* or the act of the government, by which the then existent title might be destroyed.

The obligation to pay inhered in the contract, and followed the defendant wherever he might go, and into whatever forum he might be brought for its enforcement.' The obligation to pay was not merely impaired, but utterly destroyed, by this change in the organic law, and it is argued that this retrospective principle inheres in, and is to be taken as a part of the contract in the Courts of this State. In other words, we are asked upon the mere comity of States to recognize a law of another State which, so far as it relates to this contract, is a nullity under the paramount law to which the *lex contractus* and the *lex fori* are both subordinate. This we can not do. It is not necessary to enter into any elaborate discussion of the question whether such a principle in the organic law of a State is or is not an infraction of the fundamental law. The question in analagous cases has been before the highest tribunal, and it has been so held, and, as we think, upon the soundest principle. In the case of *White* v. *Hart*, 13 Wal., 646, it was held that the provision of the Constitution of Georgia of 1868, providing that "no Court or officer shall have, nor shall the General Assembly give jurisdiction to try, or give judgment on, or enforce any debt, the consideration of which was a slave or the hire thereof," had no effect on prior contracts; that a note given for a slave, slavery being at the time lawful, by the law of the place when the note was given, is valid, and that the ideas of the validity of a contract, and of the remedy

to enforce it are inseparable; and both are parts of the obligation which is guaranteed by the Constitution against invasion; and that when a State, in modifying any remedies to enforce a contract, does so in a way to impair substantial rights, the attempted modification is within the prohibition of the Constitution, and to that extent void. 13 Wal. R., 647. In the case of *Osborne* v. *Nicholson*, also, it was held that a covenant of warranty of title and slavery for life, in the sale of a slave made prior to the abolition of slavery in Arkansas, was not broken by the ordinance of abolition, so as to defeat the vendor's right to recover the price. 13 Wal., 654. In this case, certain English cases are cited in illustration of the maxim that, after the bargain is completed, the buyer stands to all losses, and among them, that of *Mittetholzer* v. *Fullartor*, from the Queen's Bench, in which the contract was made at Burbice, in British Guinea. The plaintiff sold to the defendant the services of one hundred and fifty-three apprentice laborers, who had been slaves, for £7,800, payable in six annual installments of £1,300 each. The defendant paid four installments. The apprentices were then declared free by the local government. The defendant refused to pay the two last installments. The suit was brought to recover them. The Court held that the plaintiff was entitled to judgment, though the Legislature had determined the apprenticeship before they became due. The observa-

tions of some of the learned Judges in this case are worthy of consideration.

Lord Ch. J. Denman said: "My brother Weightman asked, during the argument, what would have been the result, if at the end of a year the services had been determined by the act of God? And to this no sufficient answer was given. The plaintiff's right vested when the bargain was made. The subsequent interference of the Colonial Legislature does not prevent his recovering what was then stipulated for."

Williams, Justice, said: "The whole question is, who shall bear the loss occasioned by the *vis major?* And that depends much upon the question, who was proprietor when the loss was occasioned?" 6 Adolph; 2 Ellis, 989.

This doctrine, however, is so firmly engrafted upon the common law, and is so consonant with justice and sound reason, that it will scarcely be questioned now. It has been sought to vary it in its application to contracts for slaves, on account of the alleged immorality of slavery; that there was an inherent vice in the very nature of slave property, causing the title to a slave merely to be tolerated, but without any obligation on the part of the government to protect it.

It is sufficient to say, in reference to this proposition, in the words of an ancient maxim of the common law, *novitas non tam utilitate prodest quam novitate perturbat;* that it is in direct antagonism to the

judicial rulings of this country from the foundation of the government, and that it is an emanation from the *jus excelsior* of the political arena, rather than a legitimate deduction from any recognized principle of law. With the morality of slavery we have nothing to do, but simply to announce the laws of property as we find them in reference to contracts of this character. We are of opinion that, neither under the comity of States, nor upon any other principle, can the Courts of this State tolerate a defence to this action, based upon a provision of the Constitution of Louisiana, which is repugnant to the organic law of the land.

A question is made upon the validity of the ancillary attachment, which was issued and levied in this case in aid of the action already begun by the service of the ordinary summons. The petition for the attachment, which, with the jurat attached, is, in legal effect, the affidavit required by law, seems in substance to conform in every particular to the requirements of the rule repeatedly announced by this Court, and the grounds of exceptions are that these are not formally repeated in the writ, and that no publication is shown to have been made. The petition alleges the institution of suit in the Court from which the attachment is sued out, the nature of the debt sued on, that the same is due and unpaid, that the defendant has fraudulently disposed of his property, or is about to do so, and prays for an attachment ancillary to the suit, "commenced as aforesaid." The writ is in the form prescribed

in the Code, with the words, "ancillary to a suit at law heretofore commenced," superadded.

The leading process in this case is the original summons. It was served upon the defendant, and brought him into Court, where he appeared and made defence to the original action. Under this state of facts, the absence of proof of publication can not be held fatal to the proceeding, the ancillary attachment, unlike the original attachment, being subsidiary process merely, and its only office being to hold the property attached for the satisfaction of the judgment to be recovered in the original action. It does not bring the party into Court. 1 Heisk., 26. Before the Act of 1843, ch. 29, the ancillary attachment was unknown to our law, and no form was prescribed for the writ by that Act. The Act of 1794, ch. 1, § 24, had prescribed a form for the writ in cases of original attachment, and this form has been brought into the Code as the only form prescribed for the writ in cases other than judicial attachments, which latter class are founded upon the return of the Sheriff upon our original summons. It is insisted that this form was prescribed for the original and ancillary writ alike. This form is given and prescribed in the chapter of the Code which authorizes and regulates the remedy by attachment generally, which chapter embraces the only authority for the ancillary writ, and it is followed by a positive provision that "no objection will lie to the form of the

attachment, if the essential matters in said precedent be set forth in such attachments." Code, § 3475.

The form of the writ in this case conforms to that precedent, except in the superadded words, that it is "ancillary to a suit at law heretofore commenced." And this was the state of the statutory law at the time of the inception of these proceedings. But it is insisted that the attachment is a nullity, because the writ does not repeat the words of the affidavit as required by certain rulings of this Court in divers reported and unreported cases, adjudicated both prior and subsequent to the adoption of the Code, and we are called upon to review these decisions, and to declare the effect of the legislation referred to upon this question. It is certainly true that the Legislature has a right to prescribe the rules and precedents of practice in such cases, and if this be done the Courts can not depart from them, except for some extraordinary reason involving the repugnance of such rules and precedents to the organic law.

The writ of attachment is an extraordinary remedy, given to the creditor against his fraudulent or non-resident debtor, and while the laws are to be liberally construed in favor of the remedy, yet the consequences are of such a serious and harrassing character to the defendant himself, in the seizure and impounding of his property, that every expresss requirement of the law must be observed. Thus, an oath in writing is required, which, with the bond, is filed in Court as part

of the record, that the defendant may be advised of the nature and cause of the proceeding. The nature and amount of the debt or demand must be stated, and that it is a just claim, or equivalent words, which import that fact; and also that some one of the statutory causes exist which authorize the writ. The writ itself is the mere mandate of the law to the officer, and simply requires of him to perform an official duty. It would seem to be unnecessary, in the absence of any rule upon the subject, that the writ should contain any thing more than the direction to the officer in the form prescribed in the Code, except in the ancillary writ such words as may identify its connection with the original suit. The property is to be impounded for the satisfaction of the particular debt sued for, and the connection of the ancillary writ with the original action should be identified, so that after judgment the Court may advisedly proceed to appropriate the property in satisfaction of the debt for which it was attached. The words, "ancillary to a suit at law heretofore commenced," would seem sufficient for this purpose if there be but one suit between the parties in the Court, for the ancillary suit is made returnable to the Court where the suit is pending, and where the record is ready to advise the defendant as to all the requisites of the affidavit as required by law. But suppose there be two or more actions, brought by the same plaintiff, against the same defendant, in the same tribunal, and the plaintiff sues out the ancillary attachment in aid of each suit, the levy upon each is upon different property,

and there is nothing to identify the connection of the writs with the suits respectively, except the general words, "ancillary to a suit at law heretofore commenced," might not very serious embarrassments follow in the appropriation of the property, especially in the event of a sale and assignment of either of the judgments? The rulings of this Court upon this subject, which, in ancillary attachments require that both the affidavit and the writ should state certain facts, would seem, therefore, to be founded in sound wisdom and forecaste, and are necessary to give efficacy and certainty to this remedy. In the language of this Court, "both the writ and the affidavit must refer to and describe and identify the suit, in aid of which the writ issues, so as to show unmistakably upon their face that they form an adjunct of that particular proceeding." 5 Cold., 565. It is conceded at the bar, that at the time the rule had its origin in an alleged *dictum*, it was a good one, and that there was no statute to the contrary. 11 Hum., 545. But it is insisted that the Code has changed the rule, by prescribing a general precedent for the writ. If the Legislature had clearly manifested an intention that the form prescribed by the Act of 1794 for the original attachment, which is brought into the Code, should also be the form for the ancillary writ, we could but yield to such clearly manifested intention, whatever amount of confusion, uncertainty and embarrassment might follow in practice. But in view of the absolute necessity for identifying the writ and affidavit in such cases with the original

suit, we are of opinion that the form given in the Code was only intended, as it was in the old law, for cases of original attachment, and that in the absence of any prescribed form for the ancillary writ, it was left to the Courts to adopt such rules of practice as would be consonant with the spirit of the law, and would make the remedy efficacious and certain. We are satisfied with these rules, and think they are founded in good sense and reason. And even if they were not, they have been sanctioned as rules of practice by this Court in many reported and unreported cases for near a quarter of a century; they have controlled the rights of property, and have been adhered to without the shadow of turning; they have gone into our new revisals for the guidance of the humblest of our judicial tribunals, and have come to be accepted as the settled law. Under such circumstances we would hesitate long to disturb them, even if they were utterly indefensible upon principle or reason.

"We have had occasion," say this Court in an early case, "to express our sense of the importance of adhering with some uniformity to decisions when once made, deeming fluctuation of judicial opinion an evil of such magnitude as not to find its equipoise of good in any fancied or real approximation to greater correctness."

The attachment in this case is null and void, and will be discharged. In all other respects the judgment will be affirmed.

H. N. Cowden *et al.* v. G. W. Pitts *et al.*

# HUMPHREY N. COWDEN *et al.* v. GEO. W. PITTS *et al.*

1. CONVERSION. *Sale for partition. Converts realty into personalty. Husband's marital rights.* The *confirmation* of a sale of land for partition under Chapter 2, Title 2 of the Code, converts the wife's realty into personalty, to which the husband's marital rights attach. In case of wife's death after confirmation, the husband and *his* representatives take the proceeds.

Cases cited: Jones *v.* Walkup, 5 Sneed, 135; Moore and wife, *ex parte*, 3 Head, 171; Rogers *v.* Clark, 5 Sneed, 665.

2. SAME. *Same.* Section 3338 of the Code has no application to sales made for partition.

Code construed: § 3338.

FROM GILES.

Appeal from the Chancery Court. W. S. FLEMING, Chancellor.

T. M. JONES for Cowden *et al.*

JOHN. C. BROWN for Pitts *et al.*

MCFARLAND, J., delivered the opinion of the Court.

This bill was filed by H. N. Cowden and his wife (Emily M. Cowden), and Shelby B. Marsh. Said Emily, before her marriage with Cowden, was the widow of Pleasant L. James, and she and Marsh were the executrix and executor of his will; it was filed against the children, heirs and legatees of said James, who were then minors, and one of the number (Amanda J.) a *feme-covert* as well as minor, being

the wife of G. W. Pitts. In the progress of the cause, on the 30th of October, 1860, the real estate of said James was sold under a decree, and the sale reported and confirmed on the 13th of March, 1861. At the time, said Amanda J. was the owner of one-third interest in the estate, subject to the dower of Mrs. Cowden. She was a minor, and had not attained her majority at her death in February, 1862. She left surviving her an infant daughter (Jenny W.), and her husband, the said George W. Pitts; and the question before us is, who is entitled to the share of Amanda J. Pitts in the proceeds of the realty thus sold; the infant daughter (Jenny W.), or the administrator of the father, who has since died?

It has been held here in a number of cases that the *confirmation* of the sale converted the wife's realty into personalty, to which the marital rights of the husband at once attach, and in such case the husband takes the proceeds of the sale to the exclusion of the heir of the wife, in the event of her death after the confirmation of the sale. See *Jones* v. *Walkup*, 5 Sneed, 135; *Moore and wife*, ex parte, 3 Head, 170; *Rogers* v. *Clark*, 5 Sneed, 665. In this latter case was a sale under the Act of 1827, by a Court of Chancery, of land owned by a minor, upon the ground of manifest advantage to the infant, it was held that the sale was a conversion of the minor's land into property. The Court having failed

to reinvest the fund in other lands, and the proceeds passed by the Statute of Distribution.

It is argued, however, that where a sale of land is decreed by a Court of Chancery, under the provisions of a chapter treating "of the sale of property of persons under disability," a different rule prevails. See chapter beginning with § 3323. It will be seen that this chapter introduces many new provisions. Among others, in § 3338, it is provided: "In sales made under provisions of this chapter, the Court shall see that the proceeds of the sale are reinvested in lands or bonds of this State or of the United States, or loaned on good mortgages on realty, for the benefit of the persons under disability or not in being, and held in the same manner and subject to the same rules of descent and distribution as the property which was sold." Under this it is argued with great force that the proceeds of the sale, whether reinvested or not, shall be subject to the same rule of descent as the land before it was sold. It is virtually conceded, however, that this section does not apply to cases of sale for partition, or other sales than those under the provisions of the chapter referred to. This leads to the inquiry, therefore, whether the sale in the present cause was a sale under the provisions of this chapter, or was a sale for partition. As we have seen, it was a bill filed by the executor and executrix of P. S. James, deceased, the latter of whom was also the guardian of the minors, the hus-

band of the latter also joining, against the three children who were minors, and the husband of one of the three; the bill, in substance, shows that by a nuncupative will the estate, which would mean the personal estate, as the land could not pass by such will, was left for the benefit of his widow and children, and the support and education of the latter, until they arrived at the age of twenty-one years, when the estate was to be divided. The bill shows various reasons why this division should at once be made, and not await the time designated by the will. The widow had married and moved away, Amanda J. had also married and left, and one of the other two minors resided with the widow, and the other with Amanda J.; that the estate was greatly depreciating in value; the land descended is described as one tract of about three hundred acres and one of fifteen or twenty acres. The widow was entitled to dower, and it is charged in the bill that the land can not be advantageously divided; that it can not be divided into four shares without manifest injury to all concerned, as there are but two springs on the same, timbered land nearly all together, and the cleared land all in a body, so that an equal division can not be made of the same, but that it would sell for a full price.

These facts are reported by the Clerk as established by the proof, and upon this the decree was entered for a sale for a division. We are of opinion that although in some respects the proceedings were

made to conform to the requirements of the chapter in question, yet this was a sale for partition under the preceding chapters of the Code, and therefore § 3338 does not apply. And upon the authorities before referred to we must hold that the representative of the husband is entitled to the proceeds of the sale belonging to his wife.

This was the Chancellor's decree and it will be affirmed, but the costs will be paid out of the fund.

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WARREN JACKSON and E. W. ADAMS *v.* WILLIS BLANTON.

1. NEW TRIAL. *Motion for. Affidavit. When insufficient.* Where an attorney, after commencement of a suit, makes objection to jurors without stating specifically by affidavit his causes until on motion for new trial; this is a waiver of such objections, and the affidavit is insufficient.
2. EVIDENCE. *Admissions. Party refusing to testify.* If upon a trial a party to the suit, being present and competent, is challenged to testify as to facts in his knowledge, or a denial of his own admissions, but declines, the jury may consider of this circumstance in coming to their verdict.

Case cited: 1 Green. on Ev., §§ 197, 199.

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FROM DAVIDSON.

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Appeal from the Circuit Court. EUGENE CARY, Judge.

W. Jackson and E. W. Adams *v.* W. Blanton.

F. C. MAURY and H. WARD for Warren Jackson and E. W. Adams.

GEO. J. STUBBLEFIED for Willis Blanton.

DEADERICK, J., delivered the opinion of the Court.

Blanton sued Jackson & Adams in the Circuit Court of Davidson County, on an account for a large quantity of lumber sold and delivered to them. They insisted in the defence on payment and set-off. Two trials took place, in each of which Blanton obtained a verdict and judgment.

On the last trial two of the jurors who sat on the first trial were empanneled without objection, and constituted a part of the jury. The record shows no exception to these two jurors until after the verdict, when defendants' counsel, on a motion for a new trial, filed an affidavit stating that the cause was taken up for trial in his absence, and that when he came into Court plaintiff had not finished the examination of his first witness; that immediately after coming into Court he discovered that the two jurors referred to were sitting on the trial of the cause. He therefore moved the Court for a *venire de novo*, or to substitute two other jurors. This the Court refused to do. He further states that when the cause was called for trial, another attorney, who knew nothing of the cause of challenge of the two jurors, volunteered and represented him until his return into Court.

The first error relied on is, that the Court refused

to grant a new trial on this affidavit. Upon turning to the record, we find it stated that the parties appeared by counsel, and a jury was empanneled for the trial of the cause. This recital in the record is not contradicted by the affidavit. In legal contemplation, therefore, the objection to the two jurors was waived. If it had been the purpose of counsel to rely upon the alleged error in refusing to grant a *venire de novo*, the motion should have been based upon an affidavit stating specific objections to the two jurors, and also showing that the counsel was guilty of no negligence in failing to be present, and making the objection when the cause was called for trial. Instead of this, the ruling of the Court was acquiesced in until after the verdict. Moreover, it does not appear by the affidavit of the counsel, nor by that of the defendants, that they were not present, nor that they were ignorant of the objection to the two jurors. We are therefore constrained to hold that the affidavit of the counsel alone did not furnish sufficient ground for a new trial.

It further appears from the bill of exceptions that the plaintiff himself was examined as a witness in his own behalf, and in the course of his examination detailed admissions of one of the defendants, and also referred to the fact that this defendant was present in Court, and could state whether the admissions were made or not. He also gave an explanation, with some uncertainty and hesitancy as to its correctness, in regard to some payments made to him by

the defendants in notes on other parties, and why these payments were not credited on his account. It appears that the defendant alluded to as being present, although a competent witness, was not called to testify in behalf of defendants.

In reference to this proof, and the fact that the defendant present in Court failed to testify, the Court instructed the jury as follows:

"That so far as any doubt and uncertainties existed as to the facts of these alleged payments, and as to whether or not any note or draft received by the plaintiff from the defendants on his account had afterwards been returned by him to them and received and used by them, or as to the state of their mutual accounts with each other—and it was in the power of either party to establish the truth by testimony within his own possession—the jury would be warranted in assuming the facts to be most strongly against the party who withheld such testimony, and that under the law as it now stands, permitting a party to be a witness in his own case, this rule would apply equally where a party had withheld his own testimony as in other cases, and that as the plaintiff had testified to certain admissions made by the defendant (Jackson) as to certain matters relating to their mutual accounts, and the defendant (Jackson), though in Court and a competent witness, under the law, had elected to remain silent and not testify on the subject of such admissions, the jury might properly consider that fact in making up their verdict, but that such fact should

not be conclusive with them, but that they should make up their verdict in view of all the evidence in the case."

It is insisted for the defendants that these instructions are erroneous, and were calculated to mislead the jury. It is an old doctrine that admissions may be implied from the acquiescence of the party, but to give force to such admissions, the circumstances must be not only such as afforded him an opportunity to act, but such also as would properly and naturally call for some action or reply from men similarly situated. These admissions should always be received with caution, and never ought to be received at all, unless the evidence is of direct declarations of that kind which naturally call for contradictions; some assertions made to the party with the respect to his right, which, by his silence, he acquiesces in. 1 Greenleaf on Evidence, §§ 197, 199. It is obvious that the instructions of the Judge, above quoted, are in substantial conformity with this rule. The defendant was present in Court during the examination of the plaintiff as a witness, and during such examination the plaintiff detailed admissions made by the defendant, and stated other circumstances calculated to operate injuriously to the interest of the defendant in the suit, and, in effect, challenged the defendant to a denial of his testimony. The defendant declined to be examined, although a competent witness. This fact was properly left to the jury as a circumstance to be weighed in determining the rights of the par-

ties. We are therefore of opinion that there is no error in the judgment below, and affirm it.

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## STEPHEN TOUCHSTONE *et al.* *v.* D. J. WHITTINGTON *et al.*

1. PUBLIC OFFICERS. *Liability and duty of, in relation to trust funds.* Where an officer holding a trust fund converts it to his own use, he is liable for its value at the time of its conversion.
2. SAME. *Same.* Such liability may be discharged in the same currency as received, though depreciated or worthless, where the officer has acted in good faith. The identical bills are not necessary, if the fund has been kept intact in the *same character of security* as received, and as the property of the beneficiary. This decision is confined to Confederate money.

Cases cited: Taylor *v.* Benham, 5 How. U. S. R., 233; Davis, Com., *v.* Harman *et al.*, 21 Gratt. R., 202, 205.

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FROM LINCOLN.

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Appeal from the County Court. H. C. CAVAN, Judge.

E. COOPER and W. B. MARTIN for Whittington.

W. L. KERCHEVAL and J. G. CARRIGAN for Touchstone.

FREEMAN, J., delivered the opinion of the Court.

This was a proceeding in the County Court of Lincoln County against Whittington, as Clerk of said

Court, and his sureties, for moneys collected by him in his office during the war, on a note given by one Sugg for lands sold by order of Court. Ten per cent. of the amount (making $509.65) was paid in cash; note given for $1,828.96 balance. At last term of this Court the case was here, and two decrees were entered, charging Whittington conditionally with both amounts—the one entered January 17, the other on the 23d. This last must be one guide in this case.

By that decree it appears that the Court held that Whittington was bound to hand over to the administrator of Touchstone so much of said first payment as he had not properly disbursed, and as remains in *kind* in his hands, and if the same does not remain in kind in his hands, he is liable to account for its market value at the time received, and as it did not appear clearly in what currency the first note was paid, a reference was ordered to be had in County Court on this question, the Clerk being required to report upon both as to the kind of currency received and the market value at the time received. It is added: This inquiry and report will not be made, if it is made to appear that Whittington still has on hand the same currency received by him. The case was remanded to County Court for this inquiry.

The Clerk in that Court made two reports on the principle of each decree in this Court, which, by mistake, were both certified to the County Court. We

need only notice the one based on the last decree above recited. Several exceptions were filed, both by complainants and defendants. Whittington alone appeals to this Court from the action of the County Court in rendering its decree, which overrules the exceptions of both parties, but adopts the report of the Clerk and Master, made in pursuance of the last decree of this Court. As to the $509.65, the Court holds that Whittington had properly accounted for that sum, and we need not consider that item, as he does not complain of it, being in his favor.

The Court finds that he, however, has not the identical currency received by him on said first note, and construes the former decree of this Court to mean that it must be the same identical bills or notes received by him, and then ascertain the value of this money at the time received, and hold him liable for the same.

The facts as to the money in the bill are, that the Clerk received it under direction of Stephens (the attorney). In July, 1863, he deposited the money, it being Confederate notes, with the Depository of the Confederate Government in Chattanooga, taking his receipt for the same, which was to be invested in coupon bonds or registered stock of the United States, at election of Whittington, the said bonds bearing 7 per cent. interest. This deposit, however, seems to have been made of only part of the money. The balance of the amount was exchanged for what was known as the "new issue" of the Confederate States,

the laws of the Confederate States at the time requiring the old notes to be filed and exchanged for this new issue within a certain time fixed, or else they became worthless. Whittington says, in his evidence, that, thinking it would be best for the estate, he exchanged a portion of this new issue for six one-hundred-dollar bonds, each bearing interest at two cents per day, which bonds he files with his deposition.

The question is whether, under the decree of this Court, the Clerk is liable for this money? The County Court held he was, according to the understanding of the decree by that Court.

It will be seen that the question settled by this Court was, that the Clerk was liable for the value of the currency received, unless he still had it on hand, the true object of the decree being to hold him liable for breach of his duty as Clerk, charged with safe-keeping of a trust fund, and that of a peculiar character, under peculiar and embarassing circumstances. In many cases officers, agents, and trustees have used for their own purposes funds of this kind in their hands, and then, after the war has ended and the money utterly worthless, prepare to meet the demand of the parties entitled by tendering Confederate money of like amount. As we have held, no such thing as this can be allowed. But it was not intended by this decree to hold the party responsible, regardless of whether he had faithfully performed his duty as to the fund in hand or

not; in other words, the same currency does not necessarily mean the same identical bills, but that the fund has been kept intact in the same character of security as received, and then, if no misuse of it, nor breach of trust, nor application of it to his own use has been made, the officer ought not to be held liable. The words of the decree holding him to account for it at value at the time he disposed of it, involve the idea of disposition of, or use or sale of the fund, not the idea that an investment in new notes of the same kind, as the means of securing it, or as means presenting a prospect of securing it when it was certain to be worthless in a few months in his hands, if kept in the form it then was. "Trustees are not held responsible for a loss, unless it has been occasioned by their own wrong, or when they are in default for not having interfered to prevent it." *Taylor* v. *Benham*, 5 How. U. S. R., 233. It is clear that the Clerk, in this case, acted with perfect good faith—changed the money into Confederate obligations of greater value, and was compelled to do so under the facts then surrounding him, or see the money die on his hands. It would have been his duty to have made an effort to save the money from becoming worthless, by exchanging it for new issue, for if he had not done so, and the issue of the war had been different, the parties now seeking to hold him responsible for doing what he has done would no doubt have insisted on his liability for neglecting, as a trustee, to use the means at hand to preserve

the funds. The case of *Davis, Com.*, v. *Harmon et al.*, 21 Gratt. R., 202, 205, is a case identical with this, and sustains the views we have expressed, and we think the principle sound, and approve it. We confine our decision, however, distinctly to the case of Confederate money, under the facts of this case, showing, as they do, perfect good faith, and the changing of the funds into like securities of the same character, for security and safety of the fund. We think it can fairly be said it is the same currency, though not the same identical bills, and that this gives the true intention of the former decree of this Court. The result is, that the decree of the County Court is affirmed as to the $509 65, and reversed as to the balance, and proceedings dismissed.

Complainant will pay costs of this Court, and that of the County Court will be paid by defendants.

## STROUD *v.* RANKIN.

1. WRITTEN CONTRACT. *Merger of original liability. When.* Where a particular sum in a specified currency is accepted, by a written agreement, as payment for property, the original liability is merged into the written contract, upon which alone recovery can be had.

Case cited: Kennel *v.* Muncey, Peck's R., 273; Code, Sections 1804–5.

2. SAME. *Same. Measure of damages.* Where the promise was to pay in current bank notes, or Confederate treasury notes, and the latter had ceased to be a currency when the obligation became due, then the value of bank notes that pass as currency at the time will be the measure of recovery.

Case cited: Woodfolk *v.* Pratt, 1 Baxter, 348.

FROM DAVIDSON.

Appeal from the Circuit Court. EUGENE CARY, Judge.

M. M. BRIEN, JR., for Stroud.

CARUTHERS, GAUT & CARUTHERS for Rankin.

FREEMAN, J., delivered the opinion of the Court.

This suit is brought to recover the value of certain corn, hogs, household, and other property, sold by Stroud to Rankin, in the latter part of 1862. Two notes were given for the agreed price of the property at or about the time of the sale, one for two hundred and fifty dollars, as follows: "I promise to pay, *when called on*, to the order of Geo. S. Stroud, two hundred and fifty dollars in current bank notes or Confederate Treasury notes, for value received, with interest from

this date;" the other a due-bill for thirty dollars, payable in current bank notes or Confederate Treasury notes.

Plaintiff sues on an account for the articles sold, claiming their value to be about four hundred dollars. The Circuit Judge held that he might recover for the value of the property, and was not bound to sue upon the notes, and the jury found a verdict for plaintiff.

The question presented is, could the seller recover the value of the property, as he might be able to prove it, in an open account? or was he bound to stand by and recover on the written promise or contract signed by the purchaser to pay the sums agreed on in the above writings, as according to their terms?

We might at once dispose of this question by following the case of *Woodfolk* v. *Pratt*, 1 Baxter, 348, in which we held that a party, in a case like this, was bound to recover according to the written agreement, and that to allow him to abandon this and sue for the value of the article sold, irrespective of his agreement, would be to enforce, not the contract of the parties, but to substitute a legal liability growing out of the receipt of the property, and the implied promise to pay in its place. In other words, to make a contract for the parties, and not enforce the one actually entered into by them. That this principle is correct, we have no doubts, and it is conclusive of this case. We deem it unnecessary to go into the general question of whether the giving a promis-

sory note or negotiable instrument is an extinguishment of an existing indebtedness, or a merger of the debt into a higher security, so that the original claim might not be sued on. Suffice it to say, that so far as that question is concerned, the abolition of the sanctity of the seal by §§ 1804–5 of the Code, has swept away the reason of much of the ruling on this question, and with the cessation of the reason the technical rules that grew out of it must cease to be operative, to a great extent at any rate. In most of the cases supposed to hold that the giving of a note leaves the original demand in full force, it will be found that the note itself was not an effective and valid security in the hands of the payee, as in the case of *Kennel* v. *Muncey*, Peck's R., 273, where the note was claimed to have been rendered invalid, and not enforceable, by reason of an alteration without the consent of the maker, or where it could not be enforced by reason of want of legal capacity of the maker to make such an instrument, or for some other like reason.

The principle we hold in the present case is, that where a party has given, and another accepted, an engagement in writing to pay for property a particular sum in a particular currency, or in property, that the creditor can not abandon this written contract and sue on the general legal liability to pay the value of the property purchased of another. That beyond all question the party must recover, if at all, on the contract to which, by the acceptance

of such written promise he has become a party, and in accordance with its terms.

As this case must go back for a new trial, and the facts are before us in a definite form, the notes themselves being set out in the record, it is proper that we lay down the rule by which the recovery of plaintiff—no other successful defence being interposed—should be governed. The promise is to pay in current bank notes or Confederate Treasury notes. Construing this obligation in the light of surrounding circumstances, it was evidently intended by the parties that it should be discharged in either the one or the other kinds of paper, as a currency passing in the business transactions of the country at the time. The value of this currency at the time the notes fell due in United States currency is the measure of the plaintiff's demand. If Confederate Treasury notes had ceased to be a currency when the notes became due, as it did at the end of the war, then the payment could not have properly been made in them, and the value of bank notes that passed as currency in the country would be the measure of recovery. We held this principle in an unreported case at last term at Jackson, in a case where the obligation was payable in bank notes or Confederate Treasury notes, and fell due after the war, and such we think the soundest and safest rule that can be adopted in such cases.

The result is, the case will be reversed and and remanded for a new trial.

John Chitwood, Ex'r, *v.* A. D. Trimble *et al.*

## JOHN CHITWOOD, Ex'r, *v.* A. D. TRIMBLE *et al.*

1. VENDOR'S LIEN. *Reserved on face of deed. Passes to assignee of note. Is an incident to the debt, and is not lost by merger of the note into a judgment.* Where a note is given for the purchase of land which is conveyed to the purchaser by deed retaining a lien to secure the purchase-money, the lien is an incident to the *debt*, and the assignment of the note carries the lien with it to the assignee; nor is it lost by reducing the note to a judgment.
2. DEED. *Reserving lien to secure purchase-money passes the legal title to purchaser. Subject to be levied on by execution.* The deed has the effect to pass the legal title to the purchaser, and it may be levied upon and sold by execution against him. But the purchaser at the execution sale takes the title incumbered with the lien, and the assignee of the note may enforce the lien against the purchaser, at execution sale.

FROM FRANKLIN.

Appeal from the Chancery Court. B. M. TILLMAN, Chancellor.

JOHN N. MCCUTCHEN for Chitwood.

MARKS & FITZPATRICK for Syler.

H. W. NEWMAN for Embry.

Opinion by the Court.

In 1861 C. R. Embry sold to A. D. Trimble a tract of land in Franklin County, receiving part of the purchase-money in cash, and for the balance taking his three notes of $465 each, payable in one, two, and three years. Embry executed to Trimble a

deed for the land, reserving a lien for the purchase-money. The two first notes were paid, and the third note was transferred by Embry to Joseph Carter, guaranteeing payment, and by Carter it was transferred to W. W. Sharp, complainant's testator. Upon this note complainant obtained a judgment in the Circuit Court of Franklin County against Trimble and Embry. After the judgment was rendered Embry died, and on motion the judgment was revived in the name of J. W. Syler, his administrator; but it does not appear that this judgment was revived by the consent of Syler, or upon *scire facias*. After the rendition of this judgment, Trimble confessed a judgment in favor of Embry in the Circuit Court, upon which execution issued and was levied on the tract of land in controversy, and at the sale thereof Embry became purchaser; but neither Embry nor Trimble have paid off the judgment of complainant against them.

Upon these facts complainant filed his bill to enforce his vendor's lien for the unpaid purchase-money. It is clear that, as a lien was retained on the face of the deed, it passed as an incident to the unpaid purchase-money, first by the transfer of the note to Clark, and then by its transfer to Sharp, complainant's testator. The lien was the incident of the debt and not simply of the note, which was the evidence of the debt. Therefore when the note was merged into a judgment, that became the evidence of the debt, and the lien continued an incident there-

to. It follows that whether the judgment against Embry was properly revived or not against his administrator, is wholly immaterial. The judgment against Trimble (the vendee) continued in force, and the lien, as an incident thereto, continued to exist.

As the legal title was vested in Trimble, the land was subject to be levied on and sold under Embry's judgment against Trimble; but Embry purchased at the sheriff's sale, and took the title to the land, subject to complainant's lien for the unpaid purchase-money.

It follows that complainant is entitled to have satisfaction of his unpaid purchase-money. The Chancellor so decreed, and to that extent his decree is affirmed; but he erred in giving judgment against Syler (the administrator of Embry), and Mary Embry (his widow), and John Hinton and his wife Mattie, and Mollie and Jennie Embry (children of C. R. Embry, deceased). This portion of the decree is reversed, and a decree will be rendered here for the sale of the land, unless the balance of the purchase-money shall be paid into Court within sixty days from the date of the decree. The cost of this Court will be paid by J. W. Syler, administrator, and his security on his appeal bond. The cost of the Court below will be paid by J. W. Syler, administrator.

R. M. Porter *et al. v.* A. W. Campbell *et al.*

# ROBERT M. PORTER *et al. v.* ALEX. W. CAMPBELL *et al.*

1. WILLS, HOLOGRAPHIC. *Insanity. Rule as to. Evidence.* Where a person is assumed to have been insane at the time of placing the will among his valuable papers, it will require an equally intelligent act of retaining it in such repository, in a lucid interval, to give it effect as a valid disposition of his property, this being equivalent to a publication; but to say he was at any time of sound mind and memory, and then retained it among his valuable papers, it would be conclusive that he intended it to be his will, is to state the rule too strongly.

Cases cited: Gass' Heirs *v.* Gass' Ex.. 3 Hum., 282; Crutcher & Crutcher, 11 Hum., 385; Act of 1784; Redfield on Wills, vol. 1, p. 373.

2. PRACTICE. *Charge to Jury. Expressions Incorrect. Reversible. When.* While the principle is a sound one, that a Judge's charge is not to be held erroneous on account of particular expressions, if the principle as given by him with all its qualifications, is substantially correct, yet if the rule as given to the jury when thus taken is not correct, and taken in connection with the facts of the case, is calculated to mislead the jury, this is ground for reversal.

Case cited: Trotter *v.* Watson, 6 Hum., 513.

3. SAME. *Burden of Proof in Insanity. Order of Counsel's Argument.* The defendants, claiming the right to have the opening and closing argument, because the burthen of proving insanity was on them, discussed.

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FROM DAVIDSON.

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Appeal from the Circuit Court. EUGENE CARY, Judge.

Gov. N. S. BROWN and J. C. THOMPSON, for Porter.

HON. R. L. CARUTHERS, for Campbell.

Opinion by the Court.

This is a case of an issue of *devisavit vel non* tried in Davidson County, contesting the will of Alex. M. Porter.

This will is a holographic one, and on the trial, when the will was produced, the defendant admitted the facts required to be shown by the statute in order to probate of such wills, and then introduced testimony attacking the will on the sole ground of incapacity of the testator to make a will, because of mental derangement. Under the charge of the Court, the jury, on the testimony, found in favor of the validity of the will, from which an appeal in the nature of a writ of error is prosecuted to this Court.

Several grounds of error are earnestly pressed on us for reversal: 1st. The defendants, contesting the will, claimed the right on the opening of the argument to make the opening and closing address to the jury, on the ground that they had the burden of proving the testator's insanity upon them. While the principle is correct, in the language of Judge Turley, in the case of *Gass' heirs* v. *Gass' executors*, 3 Hum., 282, that a party seeking to impeach the validity of a will for a supposed want of capacity on the part of the testator, must establish the fact of the insanity by the clearest and most satisfactory testimony, and therefore it may be well said that the burden of proof is on such party; yet in the form in which the question is presented in the pleadings in this

case and on the trial, we can see nothing wrong in the course pursued by the Court below. The issue, as made up by the parties maintaining the will, affirming simply that the papers propounded is the last will and testament of Alex. M. Porter, deceased; and then the contestants come and deny that the said paper writing is the last will and testament of their uncle, the said Porter, which issue was ordered to be tried by a jury. It is obvious that on this issue the propounders of the will had all the burden upon them, as in other cases, of proving the facts required by the Code, such as the proof of the finding of the will, the handwriting being generally known, etc., in order to make out a *prima facie* case, before the other parties were required to introduce any evidence whatever. The fact that they chose to admit all these facts only stood in the place of the proof, the issue required, and could not change the rights of the parties. Besides, the issue being a general one, the parties being entitled to attack the will under it for any legal cause, that they chose to present evidence as to one ground alone, can have no effect on the rights of the parties, as they stood by the pleadings making the issue. We therefore hold, there was no error in the ruling of the Court on this question. It is proper to add that we do not decide what would be the proper practice on trial of an issue of *devisavit vel non*, where the contestants presented a plea or issue in an affirmative form, asserting the incapacity of the testator, as the

sole ground of attack, nor whether the ruling of the Court on such a question would be such substantial error as this Court could reverse for. These questions are not before us in the case, and are left to be disposed of when raised.

The next objection is to the charge of his Honor, the Circuit Judge, as follows: "This will was made in December, 1861. If you shall find that after the execution of this will, and before the death of the testator, which took place in 1866, he was at any time of a sound and disposing mind and memory, and then retained this paper among his valuable papers, it would be very strong, if not conclusive proof that it was, and he intended it to be his will." While the principle is a sound one, that a Judge's charge is not to be held erroneous on account of particular expressions, if upon looking at the principle announced, with all its qualifications as given by him, it is substantially correct. See *Trotter* v. *Watson*, 6th Hum., 513. Yet if the principle or rule given to the jury, when thus taken, is not correct, and taken in connection with the facts of the case, was calculated to mislead the jury, then this Court must reverse. The facts in the record show an effort on the part of contestants to prove that the testator was insane at the time of making the will, and perhaps at all times, for a number of years before his death, reaching back beyond the period of date of the will.

Much of the testimony tended to show that he was deranged at times, but had lucid intervals of

longer or shorter duration. It will be seen that the principle announced by his Honor was intended to apply to this state of the testimony, and was applicable to a state of facts, assuming that the will might have been prepared under a state of mental derangement, but that after this lucid intervals occurred. Did his Honor lay down the correct rule applicable to such a case? Mr. Redfield, Vol. 1, p. 373, in his work on wills, cites the rule from Swinburne, as follows: "So also persons of unsound mind, having made their will when not fully competent for such an act, if they republish such wills after being fully restored, there could be no question of their validity *notwithstanding the mere retaining them*, without express republication, would not have that effect." This is a sound and correct statement of the rule as to wills, executed and published under the English Statutes requiring publication in presence of witnesses, and as to wills to be executed in like manner in this state. It has been held in *Crutcher* v. *Crutcher*, 11 Hum., 385, in reference to a will under the Act of October, 1784, providing for holographic wills like the one in question in this case, "that in case of a testamentary paper being found among the valuable papers of the deceased, and proved in the manner prescribed, these circumstances are equivalent to a publication before witnesses, because it is to be inferred that the party intended to give effect to the paper as his will." But that was a case where there was no question as to the competency of the testator to make a will,

and therefore a competent party having performed the act of placing it among his valuable papers, this intelligent act, and the finding, as required by the statute, established it, as being equivalent to publication. In case of a person assumed to have been insane at the time of placing the paper among his valuable papers, so that this act could have no effect, it would require an equally intelligent act of retaining it in such repository in a lucid interval, to give it effect as a valid disposition of his property, and to say that if he was at *any* time of a sound and disposing mind and memory, and then retained it among his valuable papers, it would be conclusive that he intended it to be his will, is to state the rule too strongly. The state of facts assumed by his Honor would be persuasive evidence of the fact, and if a knowledge of the contents of the will was shown, or could be inferred fairly by the jury from the surrounding circumstances or by direct proof, then the will might be thereby established. In other words, such a state of facts as supposed by his Honor, would make out a *prima facie* case, yet might be rebutted by proof showing that the paper was kept for a different purpose, or that it had never been seen by testator in a lucid interval, or that he did not know its contents, or the place of its deposit, or other facts, in the language of the Court in 11 Hum., 386, showing the absence of the *animus testandi*, or that the writer did not intend by that particular script to make a final disposition of his property.

It is true in this case his Honor says first, "it would be very strong, if not conclusive proof," yet taking the whole sentence, the effect of it on the jury would necessarily be to lead them to give conclusive effect to the fact of finding the script among the valuable papers, under the circumstances stated by his Honor. In other words, we hold that the law does not give conclusive effect to establish the paper as the will of the testator by the facts stated by his Honor, and that in so stating he erred.

Other questions are presented in argument, but we do not deem it necessary to discuss them, as the case must be reversed and remanded for a new trial.

J. G. Smithson *v.* Wm. Inman.

## J. G. Smithson *v.* Wm. Inman.

1. Sale of land rescinded. *Purchaser's right to compensation for improvements.* Smithson purchased land of Inman, with bond for title, to be paid for in four annual installments, and was put in possession, but was to hold at a rent of $300 per annum upon failure to pay the purchase notes, Inman reserving the right to occupy certain rooms for the four years. Inman and Smithson, for their mutual convenience, erected valuable improvements thereon. The contract was rescinded upon Smithson's failure to pay for the land.

*Held*, Smithson was entitled to the value of such improvements. Cases cited: Alston *v.* Boyd, 6 Hum., 505; 2 Hum., 174; 4 Hum., 362; 6 Hum., 324; Humphrey *v.* Holtsinger, 3 Sneed, 229.

2. Improvements. *Value of. How estimated.* In such case the value of the improvements is to be measured, by the actual enhanced value of the land, at the time defendant re-took possession.

FROM GILES.

Appeal from the Chancery Court. W. S. Fleming, Chancellor.

Noble Smithson and Whitson & Lester for Smithson.

Thomas M. Jones for Inman.

By the Court.

Inman sold Smithson a tract of land in Giles County, and took his notes, payable in four annual installments, in cotton, with a stipulation that if the land was not paid for, and the contract rescinded, Inman was to have rent at $300 a year. Inman

executed to Smithson a bond for title, reserving the use for four years of certain rooms in the dwelling-house, and an out-house for a shop for his son. Smithson went into possession, and at the instance of Inman, to avoid any trouble from two families being in the same house, for their mutual convenience, they put up another house, and other improvements, Inman furnishing the logs and shingles, and Smithson doing the hauling and putting up the houses, etc.

Before the expiration of the four years the contract of sale was rescinded, and Inman sued Smithson in the Circuit Court of Giles County on an account, one item of which was $300 for rent for 1865. Smithson filed his bill of interpleader, stating that the land was sued for by other parties, who claimed a superior title to Inman, and if they recovered he might have to pay the rent to them. He also claimed compensation for the permanent improvements made on the land by his labor, as a deduction from the rent.

The Chancellor decreed "that complainant is not entitled to any compensation for the improvements which he put upon the lands mentioned in the pleadings, the same having been put upon said land while the complainant had the equitable title to said land, and said improvements were erected by an agreement between complainant and defendant, and for their mutual convenience." From this decree Smithson has appealed.

It was determined in the case of *Alston* v. *Boyd*,

6 Hum., 505, where a sale was set aside on account of the insanity of the vendor, that the vendee should be "allowed a reasonable compensation for such improvements as enhanced the permanent value of the land." In 2 Hum., 174, where a man was put in possession of land by the owner, under a promise to convey to him, a like decision was made. So also in 4 Hum., 362, and 6 Hum., 324, upon a verbal sale which the owner refuses to complete. It was said by the Court in *Humphreys* v. *Holtsinger*, 3 Sneed, 229, that "In all such cases, if improvements are made under an expectation on the part of the vendee, '*thus in*' by contract and consent, that a title would be made to him, a Court of Equity will actively interfere, and give relief by allowing him to the extent that such improvements have enhanced the value of the land, deducting rents and profits, and will give a lien upon the land for the same."

In that case, Humphreys had purchased of Holtsinger a house and lot, for which he executed his note at twelve months, and took a bond to make title on payment of the note, with this stipulation: "If the contract is not met in twelve months after it is due, the same is subject to be revoked at the will of said Holtsinger." Humphreys remained in possession two years, when, having made permanent improvements in the meantime, but having paid only a portion of the purchase money, Holtsinger re-took the possession; whereupon Humphreys filed his bill for an account of the improvements and payments.

This Court held that he was entitled to recover for the improvements to the extent of their enhancement of the value of the land.

We are of opinion that upon the authority of these cases, the Chancellor erred in holding that complainant was not entitled to compensation for the value of permanent improvements placed upon the lands. Neither the fact that he was the equitable owner of the land at the time, nor that the improvements were made by agreement of the defendant, for their mutual benefit and convenience, could defeat his claim. He was in possession lawfully and by contract, and expected to be able to pay for the land and get title, but failing to pay, and the contract being rescinded, the defendant gets the land back, with the value enhanced by the improvements, and should, in equity and good conscience, pay for them to the extent of such enhancement. The amount of this enhancement must be ascertained by proof. The value of the labor expended in making the improvements, and of the material used therein, would not furnish the measure for ascertaining the value of the improvements, but the proof should show the actual permanent enhanced value of the land at the time the defendant re-took possession.

The decree as to this matter is reversed, and in all other respects is affirmed, and the cause remanded for further proceedings in accordance with this opinion. The costs of this Court will be paid one-half by complainant, and the residue by defendant.

T. Frazier *et al* *v.* R. L. Gains *et al.*

## THOMAS FRAZIER *et al.* *v.* R. L. GAINS *et al.*

1. PRINCIPAL AND SURETY. *Blank indorsement.* A note signed in blank by the sureties, and delivered to the principal, authorizes him to fill it up to any amount, and his act, although the amount may exceed their expectations, is binding upon them, if the note come to the hands of an innocent holder before maturity. The note not being negotiable does not alter the case, nor does the fact that a seal was affixed, since the abolishment of private seals. If payable in bank notes the measure of damages will be the value of such notes at maturity.

Cases cited: 22 How., 97; Waldren *et al.* *v.* Young; MSS. Jackson, 1872; Goodman *v.* Simonds, 20 How., 361; 10 Cush., 373; Violet *v.* Patton, 5 Cranch, 142; 2 Dana, 514; 22 Eng. Law and Eq., 516; Bank of Pittsburg *v.* Neal *et al.*, 22 How., 111; 1 Smedes & M., 25; 2 Dana, 142; 5 Ind., 258; 9 Ala., 800; 13 Id., 271; 18 Con., 353; 1 Smedes & M., 17; 6 Ala., 44; 8 Ind., 787; 1 Amer. L. C., 575.

FROM WARREN.

Appeal from the Chancery Court. B. N. TILLMAN, Chancellor.

E. H. EWEN for Frazier *et al.*

T. B. MURRAY, A. S. MARKS and JNO. H. SAVAGE for Gains *et al.*

SNEED, J., delivered the opinion of the Court.

The complainants are Thomas N. Frazier and Jas. H. Fulloss, and have brought their bill to be relieved from the payment of a note, in the words and figures following:

"Sixty days after date, we, or either of us, promise to pay Gracy & Gains seven thousand two hundred and ninety-eight dollars and seventy-five cents in current bank notes, for a lot of bacon, for value re-

ceived of them. Witness our hands and seals, this 10th of April, 1862." T. C. GOFF, [L. S.]

ISAAC B. HENSON, [L. S.]

J. A. FULLOSS, SEC'Y, [L. S.]

THOS. H. FRAZIER, SEC'Y, [L. S.]

The complainants signed said note while the amount was in blank, the said Fulloss agreeing to be the surety of Henson, and the said Frazier the surety of Goff. The note was given for a lot of bacon, sold and delivered by Gracy & Gains to Henson & Goff. Before the execution of said note, Henson & Goff had contracted with Gracy & Gains, in writing, for a lot of bacon, estimated to contain thirty thousand pounds, more or less, at twenty-five cents per pound, in current bank notes, and they were required, as a condition precedent to the delivery of the bacon, to execute a note with two good securities for the price. At that time the bacon had not been weighed, and the precise amount not ascertained. The note was, however, prepared in advance, and was presented first to Fulloss, and then to Frazier, who signed the note in blank as to the amount, the same having already been signed by their principals. The note was then brought to the defendants, Gracy & Gains, who thereupon weighed and delivered about thirty thousand pounds of bacon, amounting in value, according to the contract, to seven thousand two hundred and ninety-eight dollars and seventy-five cents, which amount was inserted in the note, upon the delivery of the bacon, of which thirty-three hundred dollars

has been paid by the principals, and credited upon the note, leaving the balance of four thousand two hundred and ninety-eight dollars and seventy-five cents unpaid, and now in controversy. The complainants claim to be exhonerated from the payment of any part of said note, on the ground that their principals were not authorized to bind them for more than three thousand dollars; and that the payment of three thousand three hundred dollars on said note was intended to relieve them to the extent of their liability, and that they are not bound for any more.

It appears that Gracy & Gains took said note in good faith, with no knowledge of any understanding or agreement between the principals and sureties, as to the extent of the liability assumed by the latter, or of any representation made by the principals to the sureties of the probable amount for which said note was to be filled up; and that they accepted said credit of three thousand three hundred dollars without any knowledge that the same was understood by either of the parties to be in exhoneration of the complainants from any further liability. The ground assumed by the complainant is, that there was an understanding between Goff and Henson that they, the complainants, were not to be bound for more than about the sum of three thousand dollars, and that with this amount the note was to be filled up. But it is not shown in the proof that Gracy & Gains had any knowledge of any understanding. On the contrary, the proof satisfies us that they were in

utter ignorance of it. It does not appear either, that either Fulloss or Frazier placed any positive limit or restriction upon their principals, as to the amount for which said note was to be given; but their equities rest upon the ground that they were deceived by the representations of Goff, as to the amount of the bacon bargained for, and that they did not expect to be bound for more than three thousand dollars. Upon this point their own testimony is decisive. It seems that Goff represented to Fulloss that the bacon would not amount to more than three or four thousand dollars, and Fulloss states in his deposition that he did expect the note to be filled up for three thousand dollars, or near that sum, and that he did not authorize them to fill up the note in any other amount; while Frazier, in his testimony, states that "Goff did not know precisely the amount the note would be for, but thought about three thousand dollars, a little more or less. That he did not authorize Goff, or any one else, to fill up the blank with any amount whatever, but that he signed with the expectation and belief that Goff would fill up the note with the sum he had previously represented to him that the bacon would come to, or the sum of three thousand dollars, or about that sum, and expected to be responsible for that sum, but nothing was said about the amount, or about its being filled up with any amount."

It appears that Goff had made these representations to Frazier about two weeks before the latter

signed the note, and when the note was carried by Goff to Frazier to get his signature, the latter discovered that it was in blank, as to the amount, but seeing that all the other parties had signed it, and relying upon Goff's representation, previously made, he signed the note without further questions, and delivered it to Goff in its blank condition.

It will be observed from this statement that the complainants do not bring themselves within the principles governing a case where the payee of a note is advised of the fact that the agent exceeds his authority in filling a blank in a note, or even within the principles of the case, when there is a positive restriction upon the agent's authority. It is manifest that the complainants were deceived by the man they trusted, and whom they were befriending, but the defendants are innocent of all connivance at, or knowledge of, the wrong at the time they parted with their property for the note; and we know of no principle upon which this overweening confidence of the complainants can be visited upon the defendants. Whatever might have been the first expectations of the complainants as to the result, yet they did not limit the authority of their agents, nor do they fix notice upon the defendants of the deception; and they must be held bound upon the familiar doctrines of the law which govern the relation of principal and agent; nor is the application of these doctrines affected in the least degree by the non-negotiability of the note in question, nor by the circumstance that

a seal or scroll is affixed to the signature upon the note, as the note was executed after the enactment of the statute which abolishes the private seal to contracts, and abrogates the effect of a seal as it existed at common law.

The equities of the parties must, therefore, rest upon the familiar principle that where one of two innocent parties must suffer through the fraud or negligence of a third party, the loss must fall on him who gave the credit. 22 How., 97; *Waldren et al.* v. *Young*, MSS. Jackson, 1872.

The rule is, that when one party, intending to accommodate another, signs his name to a blank paper, he authorizes the other to whom he delivers it, and for whose accommodation it was made, to fill up the blank, and he is bound by it. *Goodman* v. *Simonds*, 20 How., 361; 10 Cush., 373; *Violet* v. *Patton*, 5 Cranch, 142; 2 Dana., 142; 22 Eng. Law and Eq., 516. So a note signed in blank and delivered is an authority in law to fill it up to any amount; it is an unlimited letter of credit, and the intention of the principal as to the amount to be inserted could not control the act of the agent in dealing *bona fide* with third parties. *Bank of Pittsburg* v. *Neal et al.*, 22 How., 111; 5 Mon., 25; 2 Dana., 142; 5 Ind., 258; 9 Ala., 800; 13 Id., 271; 18 Conn., 353.

If the note, however, be taken with the knowledge that it has been filled in violation of the limitation imposed by the principal, the holder will be in no better situation than the agent. I Smedes &

Mar., 17; 6 Ala., 44; 8 Ala., 787; 1 Amer. L. C., 575.

In this case, whatever the complainants might have understood as to the amount for which they were to be bound from the representation of their principals, yet there was no positive restriction upon the latter, and even if there had been, the defendants parted with their property for the note in good faith, and without any knowledge of any such understanding.

The complainants must, therefore, be held bound upon the note, and can not be heard to complain as against innocent parties, of an act occasioned by their own incaution. The note is, however, payable in current bank notes, and the measure of their liability must be the value of current bank notes at the time of the maturity of the note.

The decree will be reversed, and the cause remanded for an account of the value of the currency contracted to be paid, and for further proceedings in accordance with this opinion. The costs of this Court and the Court below will be paid by complainants.

J. W. Johnson and Wife *v.* O. F. Bruster.

# J. W. Johnson and Wife *v.* O. F. Bruster.

1. Constable. *Motions against. Recitals of.* A judgment based upon a motion deficient in proper recitals, is void, though such motion may refer to a notice already spread upon the minutes embracing the necessary facts.

Case cited: Watkins *v.* Barnes, 1 Sneed, 205.

## FROM WARREN.

Appeal from the Circuit Court. W. P. Hickerson, Judge.

Savage and Swofford for Johnson and Wife.

W. E. B. Jones for Bruster.

Freeman, J., delivered the opinion of the Court.

This was a judgment obtained by motion, against the administrator of a Constable, and the sureties of the officer on official bond, for failure to return two executions from a Justice of the Peace.

The case must be reversed, for the following reasons: It is well settled that the notice given to the officer is not the commencement of the suit, is not process, but an individual act of the party. As such, it is not part of the record, certainly not part of the pleadings, if such term can be applied to these informal proceedings authorized by our statutes. We find in the record a formal notice marked "filed" by the Clerk, and which is or appears to have been entered on the minutes of the Court, in which the grounds on which he intended to make

his motion are set out. Then follows an entry of his motion as follows:

"And thereupon the plaintiff moves the Court for judgment against ——— ———, in pursuance of the notice given aforesaid, which motion is continued until next term."

In case of *Watkins* v. *Barnes*, 1 Sneed 205, it is laid down.

The motion is commencement of the suit, and the record must show distinctly the particular ground upon which it is made, and upon that the judgment, to be valid, must be rested. If that is not sustained the motion fails. Here the motion itself shows no ground on which it is made, or a judgment is sought, but simply says it is made for a judgment against ——— ———, in pursuance of the notice given aforesaid. We can not say, from the face of the motion, for what cause it is made, except by reference to another paper, the notice, nor can we see against whom it was made, as the name of the party is not given. We might infer it was intended to be made against Pennybaker, but in view of our decisions giving any thing but a liberal construction to the remedies under our statute by motion, and the fact that as to the sureties they are summary, and without notice to them, we do not feel authorized to make the inference required.

The motion entered in Court, while it does not require the form of a declaration, should show on its face the amount and date of the execution, against

whom it is made, on what judgment the execution issued, and these statements should appear with reasonable certainty, as the motion is the first step in Court in these proceedings, and the only record evidence of what is in controversy, and upon what grounds the motion was made. That the plaintiff gave a constable a notice that he would move against him, and then comes into Court and moves for a judgment against ——— ———, in pursuance of said notice, we think can not furnish a ground on which to base a judgment against an officer and his sureties, unless we abandon the principles so uniformly acted on, and so long settled in such cases by our Courts.

The case will be reversed and motion dismissed.

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STATE OF TENNESSEE, for use, etc., *v.* LEVI McCALLUM *et al.*

1. SHERIFF. *Motion against. Liability of sureties.* Where a sheriff accepts notes for collection, and fails to take out execution, or make the money on the same, after judgment before a Justice of the Peace, under the circumstances, he is simply an agent for collection, and his sureties are not liable upon his bond for such failure.
2. SAME. *Same. Res judicata.* A judgment on motion in favor of a sheriff precludes a subsequent suit for the same default, where the Court had jurisdiction on the motion to render a judgment against the sheriff.

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FROM HICKMAN.

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Appeal from the Circuit Court. ELIJAH WALKER, Judge.

State of Tennessee, for use, etc., *v.* Levi McCallum *et al.*

L. D. MYERS for McNeely.

T. P. BATEMAN and N. N. COX for McCallum.

McFARLAND, J., delivered the opinion of the Court.

This is an action against McCallum and his sureties upon his official bond as former sheriff of Hickman County. Various breaches of the covenant are assigned:

1st. That McCallum, having given his receipt for the collection of several notes of the plaintiff, McNeely, failed to make the money from the defendants, after judgments were had on the notes before a Justice of the Peace.

2nd. That he failed to take out execution on said judgments to himself or his deputy.

Upon the first two breaches assigned the Circuit Judge held that the bond contained no covenant requiring the sheriff, in his official capacity, to perform these services, and that the law does not make the performance of these acts a part of his official duty. His obligations to the creditor in this regard being only that of an agent, for which his sureties on his bond are not liable.

As a defence for failing to return the executions, the defendants pleaded that after the alleged default occurred, and before the commencement of this action, the plaintiff, McNeely, instituted a motion against the defendants in the Circuit Court for failing to return the identical same execution; that this motion was regularly heard and determined, and judgment ren-

dered in their favor; that this judgment remained in full force, unreversed and unappealed from; this plea was sustained by the record. The Circuit Judge held that this was a former adjudication of the question, and a bar to any recovery in this action for failing to return the execution. This is assigned as error.

The remedy against sheriffs by motion, given by the statute, does not take away the common law remedy by action of covenant upon the bond. The latter remedy is more comprehensive, and may be maintained upon grounds for which a motion will not lie. To the extent that a motion lies, the remedies are concurrent. It is a well settled principle that when a question has been judicially determined by a Court, having jurisdiction of the subject matter and the parties, as between the same parties, it is to be regarded as finally determined, and the judgment is a bar to a subsequent action, either in the same or a different form, or different Court, between the same parties, for the same cause of action.

It appears that in the motion referred to the Circuit Court had jurisdiction of the parties, and the jurisdiction to determine the question of the defendants' liability for the alleged failure to return these executions, and having determined the question, and the judgment remaining in full force, it can not be again heard. It does not change this result, that the measure of damage is different in the one case from the other.

The White's Creek Turnpike Co., *v.* John W. Marshall *et al.*

It is the adjudication that the defendant, McCallum, is in no official default by reason of his alleged failure to return the executions by a Court having jurisdiction that precludes a re-examination of the question.

There is no error, and the judgment must be affirmed.

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THE WHITE'S CREEK TURNPIKE COMPANY *v.* JOHN W. MARSHALL *et al.*

STATEMENT OF CASE: The County Court of Davidson, by virtue of the Act of 1835, ch. 54, Code, § 1277, appointed three superintendents, "to look over the several turnpikes, roads and toll-bridges within the county, and see that the same are kept in such repair as is required by law;" and these superintendents ordered the gates of the White's Creek Turnpike Company to be thrown open, under § 1282 of the Code. The Turnpike Company filed its bill against the commissioners, seeking to enjoin their action in this respect, and admitting that the road was not in such condition as required by the charter, but setting up the Act of the 9th of January, 1865, as a legislative pardon, and alleging compliance with said act, and claiming that neither the County Court nor the superintendents had any legal right to act in the premises. The Court held:

1. TURNPIKE. *Public road. County Court. Commissioners. Jurisdiction of Chancery Court.* The Chancery Court had jurisdiction of this case, because complainant had no full or adequate remedy at law.
2. SAME. *Same. County Court. Power to appoint superintendents.* The County Court has no jurisdiction over turnpikes before forfeiture is declared, except to appoint the superintendents, as required by the Act of 1835, and this only upon the assumption

that the Act of 1835 is constitutional and valid, which the Court discusses, but declines to decide.

3. SAME. *Same. Same.* Whether the Act of 1835 is constitutional or not, it is no part of the duty of the County Court or superintendents to determine whether or not the turnpike company had complied with the Act of 1865.
4. SAME. *Same. Same.* The Act of 1865 was a legislative pardon to the turnpike company which had complied with the same, against the penalties of the Act of 1835, or other penalties provided by its charter for allowing the road to get out of repair.
5. SAME. *Same. Same.* The County Court has no power to control the action of the three superintendents appointed by it.
6. SAME. *Same. Injunction. Demurrer.* The injunction was properly granted and the demurrer properly overruled.
7. SAME. *Mandamus. Conditional pardons.* "*Due process of law.*" The Court discusses the question of mandamus, conditional pardons, "due process of law," incidentally, but rests the decisions upon the above points.

Cases cited: Simpson *v.* The State, 10 Yerg., 525; *Ex parte* Nash, Queen's Bench, 93; 13 Pet. 279; 4 Wall., 522; 17 Howard, 225, 284; 1 Cranch., 137; 14 Pet. 479; 12 Barb., 215–17, 166, 24, 156, 217, 162, 52, 15, 607; 10 Johnson, 485; 1 Wend., 318; 2 Hill, 456, 243; 5 Hill, 616; 23 Wend., 458; 21 Ward, 20; 11 New York, 563; 12 New York, 299; Bank of Columbia *v.* Oakley, 4 Wheat., 235.

Code construed: §§ 1182, 1277 to 1283–8.

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FROM DAVIDSON.

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Appeal from the Chancery Court. EDWARD H. EAST, Chancellor.

DEMOSS and MALONE for the Turnpike Company.

JOHN C. THOMPSON, F. WILLIAMS and THOMAS L. DODD for John Marshall *et al.*

MCFARLAND, J., delivered the opinion of the Court.

The bill charges that the White's Creek Turnpike

Company was organized under a charter granted by the Legislature on the 2d day of January, 1830. We find, however, that an Act was passed in 1842, appointing commissioners in the place of the former commissioners, and granting to them the powers contained in the original charter. In 1844 another Act was passed authorizing the Nashville Bridge Company to subscribe stock in the White's Creek Turnpike Company, and from this Act it appears that said turnpike company was not then organized, or the road constructed; and although the case now stands upon a demurrer, we are inclined to think that we may look to these public laws, and from this arrive at the conclusion that the company was not organized until after the date of this last Act in 1844. Though it is true, as the bill charges, that the charter under which the company was organized was originally passed in 1830, this original charter contained a provision that upon the failure of the company to keep the road in repair, any one may give notice thereof to a Justice of the Peace, who shall summon three freeholders to meet at the place complained of, and if said freeholders, or any two of them, shall find the road to be out of repairs within the intent and meaning of the Act, the tolls shall cease until the defective part is put in repair, and the person entrusted with the repair shall be subject to a fine of ten dollars—one-half to the informer. After the date of the original charter, but before the acceptance thereof and organization of the company (to-wit,

in 1835), an Act was passed, known as the "Turnpike Act." This Act, in substance, provides that the County Court shall appoint three commissioners or superintendents of turnpike roads and bridges, whose duty shall be to see that said roads and bridges are kept in repair as required by law, and when in the opinion of a majority of said commissioners the roads are in bad condition, they shall have power to open the gates until the road is put in good order; and to open the gates, or take toll, or obstruct the road during the time the gate is required to be closed, is made a misdemeanor, and subjects the offender to fine and imprisonment.

This Act was brought into the Code with the additional provision that upon conviction for opening the gates or taking toll, etc., during the time the gate is required to be closed, shall operate as a forfeiture of the charter. One of the questions argued in this case is, whether the provisions of the complainant's charter or the obligation of the contract contained in the charter are impaired by adding material restrictions not contained therein, and providing means by which the complainant's property and franchises are to be taken without due process of law?

On the 9th of January, 1865, an Act was passed, as follows: "That with a view to the relief of the traveling community generally, and the incorporated turnpike companies of the State, permission is granted said turnpike companies to collect toll at their several gates, the proceeds of the same, after paying the

expenses of collection, shall be appropriated to the repair of the said roads, till the same are made equal to the requirements of the original charter, when this section shall cease to have any further effect." This Act was repealed by the Act of March 7, 1867. And again this repealing clause was repealed by the Act of the 16th of January, 1868. The bill in this case charges that by the results of the war its road had fallen below the requirements of the charter, and this was the general condition of such roads in this State; and in view of this the Act of the 9th of January, 1865, was passed; that this Act was accepted as an amendment of its charter, and again accepted when the Act was restored on the 16th day of January, 1868. The bill further charges that the net proceeds of the toll (and more) have been employed in repairing the road ever since the Act of 1865, and though not in so good order as the owners desire, it is above the average and really one of the best roads in the county. It is not averred to be up to the requirements of the charter.

The bill further charges that recently, before it was filed, the defendants (John G. Marshall and John Howe), who, together with defendant, made *profert* to have been appointed by the County Court of Davidson Superintendents of Turnpikes, have notified the President that the road is not in good condition, and requiring him to open the gates. The copy of the notice is exhibited. It directs the gates to be kept open until the road is repaired as the law

requires. The bill prays for an injunction restraining the said commissioners and County Court of Davidson County from interfering with the rights and franchises of the company. The Chancellor overruled a demurrer to this bill, but allowed an appeal to this Court before taking further action. The grounds of demurrer raises the question as to the complainant's right to relief upon these facts. The complainant's counsel have argued in favor of their right to relief, mainly upon the ground that the Act of 1835 is unconstitutional as to their rights vested under its charter, not because they express less confidence in the other questions involved, but because they greatly desire a decision of this question. If the decision of this question is essential to the decision of this case, we must of course decide it.

We have been furnished with the able opinion of the Chancellor, in which the grounds of his decision are clearly set forth, and, while he argues strongly against some features of the Act of 1835, he does not rest his decision on the ground that the Act is unconstitutional, there being in his opinion one safe ground on which to place it.

One ground of demurrer taken is that the County Court has exclusive jurisdiction of roads, and the Chancery Court has no jurisdiction to revise its action. Upon this question we adopt the opinion of the Chancellor, and hold that as long as the charter of a turnpike company is not forfeited the County Court has not jurisdiction except upon the assumption that

the Act of 1835 be valid, in which case the Court has the power to appoint the commissioners provided for, but we do not find that it has power to control or change their action.

Again, as to the right of complainant to relief upon the facts stated. Assuming for the argument that the Act of 1835, as modified in the Code, is valid, and does not interfere with any vested rights under complainant's charter, what is the effect of the Act of 1865? If the Legislature had the right to apply the provisions of the Act of 1835 to companies previously chartered, beyond doubt it might suspend or modify these provisions at pleasure. Owing to the disasters of the war, as it is assumed, the complainants road became in bad condition, not coming up to the provisions of the charter, and for this reason the commissioners might have opened its gates and the charter might have been declared forfeited. We infer from the statements of the bill that the company was not collecting toll previous to January, 1865. In this state of affairs the Act of 1865 was passed. It fully recognizes that the roads were in bad condition, but deeming it better for the interests of the public not to have the stringent provisions of the previous law enforced, enacts that such companies may at once proceed to collect toll, without waiting to repair their roads, and apply the toll, after deducting the expenses of collecting, to repairing their roads. After this, could the commissioners open the gates simply because the road was in bad condition?

This is what they did, according to the allegations of the bill. They notify the complainant to open the gates until the road is repaired as required by law, accompanying their notice with specifications pointing out the bad condition of the road. Admit this to be true, does it follow that the commissioners had the right to open the gates? Under the Act of 1865 the company had the right to keep its gates open and receive toll, notwithstanding its bad condition, provided its net proceeds were applied to repairing the road. It follows that the commissioners were not authorized, as they assumed to do, to close the gates simply because the road was in bad condition.

Were the commissioners authorized to take upon themselves the execution of the Act of 1865, and determine whether or not the net proceeds of the tolls had been applied to the repairing of the road; and if, in their opinion, this had not been done, to close their gates? From the allegations of the bill and exhibits, to which alone we can look, upon a demurrer, they have not assumed to act upon this ground. Nor are they charged with the duty of executing the Act of 1865. They are not referred to in the Act. Their duties, under the Act of 1835, were to inspect the road and determine whether it was in the condition required by the charter, and if not, to close the gates, and from their decision the Act provides for no appeal. How can we hold upon these Acts that the commissioners

were authorized to decide without notice, without judge or jury, or any of the processes known to the law, that the complainant had not complied with the Act of 1865, and applied the net proceeds of tolls to repairing the road, close the gates and leave the complainant without remedy, although, as the bill alleges, the company stands ready to show that in fact the Act of 1865 had been fully complied with. The commissioners are not charged with the duty of determining this question. They are not the proper tribunal to determine a question of this character, and in no case should it be determined without giving the company an opportunity to be heard. And besides all this, if they have, as the bill charges, determined this question against the truth of the case, the complainant cannot be without remedy.

This view does not deprive the State of a remedy in the event the company keeps its gates closed without repairing the road. In such case it is subject to indictment or proceeding to declare the charter forfeited. See *Simpson* v. *The State*, 10 Yerg. And it could only make a successful defence by showing that the tolls had been applied as required by the Act of 1865.

It seems to us clear that if the company has, as alleged in the bill, applied in good faith the net proceeds of the tolls to repairing the road, as provided by the Act of 1865, it had the right to keep the gates closed and receive toll, and the

defendants were not justified in opening them; and against this unlawful interference the company can not be without remedy. The only ground taken in the demurrer on the question of jurisdiction is, that the jurisdiction is in the County Court. This, as we have already said, we think is not so. We are of opinion that the Chancery Court had jurisdiction. We have adopted mainly the views of Chancellor East, to whose opinion we refer, as containing a clear and more elaborate discussion of the question. And we agree with him that as this is a safe ground to rest the decision of the case upon, it is not proper to pass upon the constitutionality of the Act of 1835, until the decision of that question becomes imperative.

The decree will be affirmed and remanded. Costs of the Court will be paid by the defendants.

### OPINION OF CHANCELLOR EAST.

The complainant (the White's Creek Turnpike Company) heretofore filed their bill in this Court, and obtained thereon a temporary injunction against John Howe, William Wade and John Marshall, commissioners or superintendents of turnpike roads in the County of Davidson, acting under an appointment from the County Court. The facts, in brief, are these:

By an Act of the Legislature passed on the 2d day of January, 1830, certain persons were empowered to build the road in question, with powers

and rights conferred in the charter, which will be noticed herein more in detail. There was no acceptance of this charter, or no action taken thereunder. Succeeding Legislatures revived this charter from session to session, until by an Act passed in 1842 the same was revived and the chartered powers conferred upon another set of men from those mentioned either in the original charter or the Acts keeping it alive. This Act recites the fact that the road had not been built, or any steps taken under the original charter. In 1835 the Legislature passed a general law relative to turnpike roads. By § 1 of the Act, "the several County Courts were required to appoint three commissioners, whose duty it was made to look over the several turnpikes and toll-bridges within their respective counties, and see that the same are kept in such repair as is required by law, and whenever, in the opinion of said superintendents, the said turnpike or toll-bridges shall manifestly be in a bad condition, a majority of said commissioners or superintendents shall have power to open the gates of said public ways until the same shall be put in good order and condition.

Section 2 declares that any owner or grantee of a turnpike or toll-bridge, or other person who shall receive any toll, or demand the same after, for and during the time the commissioners have required the gates to remain open, shall be guilty of a misdemeanor, and be liable to an indictment or presentment, and upon conviction shall be fined in a sum

not exceeding one hundred dollars, and may also be imprisoned.

Section 4 enacts that if the owners of the road or bridge shall refuse, for the space of six months, to put the same in good repair, the Attorney General should issue a *scire facias* in the name of the State, requiring the owners to show cause why the charter should not be forfeited.

By Section 6 these commissioners were required to take in *open* court, a prescribed oath to do equal and impartial justice, etc. The punishment for allowing the road to get out of repair, as fixed by the charter in this case, was different from the one prescribed in this Act of 1835. By the charter three freeholders and a Justice of the Peace were made a tribunal to try the question of the condition of the road, with power to inflict a fine of ten dollars or more.

The arguments made to the Court relate first to the question whether the charter is to be regarded as having been passed in 1830, and if so, the question of the right of the Legislature to change the mode of punishment and penalty for the road being out of repair from the mode and penalty prescribed. Secondly, if it is not to be regarded as having been passed in 1830, then assuming that it was passed in 1842, and became at this date a vested right, whether the Act of 1835, with its mode of punishment and its penalties, change the same as prescribed by the charter, or whether the remedy of the State, as regu-

lated in the charter, is exclusive of all others, and not merely cumulative.

The present incorporation had no interest, vested or otherwise, in the charter or benefits secured by it, until the Act of 1842 revived it for their benefit, nor then until they had accepted it, and the fact that the Act had been passed in 1830 is no avail to them. It is to be regarded as having been passed as a whole, for the first time, in 1842, at the date of the Act of revivor. They had no rights under the charter to be impaired under the Act of 1835. But does not this involve another difficulty? Here we have the Act of 1835, with its modes of procedure and its penalties, in full force at the time the charter is passed and accepted—the remedies reserved to the State being wholly different in the one from the other. Do remedies to be applied by the State against offending corporations, which remedies are recognized by a general law, enter into and become a part of the charter? If no remedy is prescribed in the charter, we say yes. But suppose the Legislature should prescribe in the charter one wholly different from the one allowed in the general law, and the State should undertake to enforce the one prescribed by the general law, could the corporation insist that the State was bound by the contract, and that the specific remedy was alone applicable? The Legislature may prescribe to itself other remedies, cumulative to the one prescribed in the charter, by

an Act subsequent to the charter, has been decided in this State in the case of *Simpson* v. *The State*, 10 Yerg., 525. Now, if it is empowered to change or to add others by an Act subsequent, it would be hard to prove that it had not the power to do it by Act previous to the charter. In such a case the question seems to me to be not so much one of legislative power as of legislative intent and construction. Legislative power over remedies is so great and is open to so much discussion, the tendency of the best adjudicated cases being favorable to an enlargement of the same, and giving a liberal construction to such statutes, inclines me to the opinion that it possess the power alluded to, and that it would be the duty of the Courts to construe the statutes as intending to enlarge remedies. Where rights are not affected very little danger can arise from merely remedial statutes. Every person and corporation has a right to some remedy, while neither has a vested right to a specific remedy, in any sense in which the same may be said to be secured by the Constitution.

The bill alleges that the commissioners appointed by the County Court have opened all the gates upon the road of complainant, and denies the constitutionality of the Act of 1835 empowering them to do so. The demurrer to the bill denies the jurisdiction of the Court to enjoin the same, and insists that the jurisdiction of the County Court is complete for all purposes; that complainant may be heard in that Court, and that that has by law original and exclusive

jurisdiction of roads, including turnpikes. If the latter proposition of the jurisdiction of County Courts over roads of this character be good in law, then it was wrong to have granted the injunction, and would be wrong to continue it, and the bill is without merits, and the demurrer should be sustained and the bill dismissed. That the County Court has *any* jurisdiction over turnpike roads, or railroads, or any other roads than the four classes designated in § 1182 of the Code, I have been unable to discover. It can not order a turnpike to be built; it can not charter one; it can not give a road the right to collect toll; it can not deprive one of its charter, nor could it discontinue one. That it has large powers over the four classes of roads designated in said section is quite true, but it has not *exclusive* jurisdiction over these; all the power it has, relative to turnpikes, is derived from the Act of 1835, carried into the Code, from § 1277 to § 1283, inclusive. Let us now examine that Act, and see what powers it confers upon the County Courts. It confers the power upon the County Court, a majority of the Justices being present, to appoint three superintendents, whose duty shall be, etc., etc. Here the Legislature has delegated to that Court a power of appointment merely. It might have delegated the same power to any other Court, or to the sheriff of the county, or might have made the appointment itself. Who is the County Court to appoint? The Acts answer the question in the negative: "No person who is connected with the

owners of said roads, etc., by consanguinity, or affinity, or interested in the profits or tolls arising from them." Here is a limitation upon the power of the Court. I mention these with a view to meet the argument that was made to the effect that as the three persons who were appointed in the case were themselves Justices, and members of the County Court, that this fact made it the act of the *Court*, as such. The County Court could as well have appointed any citizen of the county as one of their number, and perhaps would have by so doing fallen within the spirit of the Act. As these superintendents are to be paid such compensation as the County Court may allow them, and which is to be paid by the roads (§ 1283), and they being members of the Court, and as such empowered to vote upon the question of the amount to be allowed themselves, it would seem to warrant the inference that the Legislature never intended that members of the Court should be appointed. Be this however as it may, it can not for a moment warrant the conclusion that the action of these superintendents is the judicial action of that Court. These superintendents, when appointed, become a separate and distinct body of men from the Court; the Court could not enlarge or diminish their powers; has no jurisdiction over them; can not compel them to act, as it can its ordinary officers; in short, they are put under the obligation of an oath wholly different from that of the Court, as its members. The appointment by the Court is a conclusion of its power; it exhausts

all its power in making the appointments. If the commissioners were to throw open every gate in the county, wrongfully and unlawfully, the County Court could not sit upon and reverse their action any more than they could the official action of a sheriff or revenue collector elected by that body, as was allowed formerly. The gates are to be thrown open or not, as a "majority of said superintendents" shall determine, not as the *Court* shall determine.

Upon the point of jurisdiction of County Courts over turnpikes, this jurisdiction *may* arise and be fully established by §§ 1288 and 1289, but does not occur until there has been a judgment of forfeiture; before this judgment it has only the power to appoint commissioners. I conclude this branch of the subject with the determination that if the owners of the road were now to go before the County Court and ask that Court to revise and reverse the action of the commissioners, it would have no power to entertain the motion, and any action it might take would be a mere nullity, and to undertake to do so would, besides being unlawful, be wholly impracticable to so large and unwieldy a body. No appeal is granted from the action of the commissioners to any Court; no provision is made to have the matter adjudicated elsewhere. The next step, if the owners of the road do not submit to the verdict of the commissioners, but instead thereof proceed to demand or collect toll, is an indictment or a proceeding for a forfeit—one or both; and these occur when toll is demanded "while

the gate is required to be kept open by the *superintendents*; (§ 1288). The owner of turnpike roads, feeling aggrieved by the action of the commissioners, certainly have a remedy in some Court. This proposition I shall not argue. To put the property, rights, life or liberty of any man or corporation into the hands of commissioners or superintendents who are not clothed with judicial powers by the Constitution, who have no form of trial, summon before them no one, hear no witnesses, refuse to hear a party to be affected or his counsel, become judges of the law and the facts, sit in secret, have no place for hearing or adjudicating conflicting interest, and condemn a man without a day in Court or a hearing, would be shocking and revolting, and not to be endured for an instant. This the counsel for the defendant felt and admitted, and to avoid, claimed first that the County Court had ample jurisdiction, secondly that complainant had ample remedy (by *mandamus*) from the Courts of law.

I have concluded that the County Court had no jurisdiction in the matter, and shall proceed to consider whether complainant's remedy is by *mandamus* or injunction. As a general rule it may be said that this Court will not take jurisdiction if the complainant has a complete, adequate and unembarrassed remedy in another Court; and, if he has not this, then it is the duty of the Court to take jurisdiction. Have the owners of the road a "complete, adequate and unembarrassed remedy" by writ of *mandamus*?

The commissioners have acted, and acted before the complainant had notice, and the *mandamus*, if issued for any purpose, would be to compel them to *undo* what they have done—that is, that they give the company the right to close its gates and collect tolls. In the case of ex parte *Nash*, 15 Queen's Bench, 92, the Court say, "That inasmuch as a *mandamus* lies merely to command that to be done which by law ought to be done, and *not to order the undoing of that which ought not to be done*, it will not lie to to order a railroad company to take the seal off from the register of shareholders, on the suggestion that it was affixed without authority and contrary to law." Here the commissioners have acted, under the obligation of an oath, in a matter committed by law solely to their judgment and discretion. Who can now compel *them* to undo what they have done? If so, why swear them? A *mandamus* lies to compel an officer clothed with full or *quasi* judicial power to exercise these powers, not to correct his judgment after he has acted. 13 Pet., 279. This would be to substitute the judgment of the Circuit Judge for the commissioners, and to compel the commissioners to reverse their judgment, already given under oath. 4 Wallace, 522. An inferior tribunal may be compelled by *mandamus* to proceed to judgment, but not to substitute the judgment of the superior Courts for its own. These commissioners or superintendents are not merely ministerial officers, acting under the orders of a court or statute, without any judgment or dis-

cretion of their own; they are in a great degree clothed with judicial powers; they are required to take cognizance of facts, to-wit: the condition of the road; and to these facts apply the law, viz: the requirements of the charter; and upon these two propositions to give judgment. To admit that the Circuit Court can compel them to give judgment contrary to their consciences and their honest convictions would, to say the least, be very extraordinary. It will be kept in mind that the Circuit Judge, if he should differ with the commissioners, can not push them aside, and by his sheriff or other ministerial officer execute his own judgment, but would be compelled to act through the commissioners, and compel them to perform his judgment, and if they refused to send them to jail, or otherwise force them. This writ is only used in cases where the act to be done is merely ministerial, and the relator is without other adequate remedy. 17 Howard, 284; Id., 225; 1 Cranch, 137; 14 Pet., 497.

Again, a *mandamus* could not be granted where it would be unavailing, for the want of power in the defendants. 12 Barb., 217; 15 Id., 166; 24 Id., 156. If the defendants have exercised the power vested in them, and have not the right and power to review their own acts and undo them, the writ should be refused as vain and fruitless. 12 Barb., 217, 162, 52; 15 Id., 607. These commissioners have met and performed the acts required of them by law, whether properly or erroneously, have now no power to act

further in the matter, unless it be to give the owners of the road certificates to the effect that they have repaired their road, and even this power is not given in the statute. Neither will the writ be granted if the relator has any other adequate legal remedy. If he could sue the commissioners in trespass and recover of them damages for any wrong done him, then the writ will not lie. 10 John., 485; 1 Wend., 318; 2 Hill, 45; 6 Id., 243; 5 Hill, 616; 23 Wend., 458; 21 Wend., 20; 11 N. Y., 563. The foregoing constitute in part, but not wholly, the reasons why the proceeding by *mandamus* would not lie and could not be effective, and these principles have become too well rooted in the jurisprudence of the country to be questioned or disturbed. I therefore conclude that the complainant is compelled to apply to the Court, for the reason that it is without remedy elsewhere, and being here, we will proceed to examine the allegations of the bill, and as no answer has been put in, but the case stands on demurrer, for the present I am to take the bill as true in all its allegations.

Complainant alleges the Act of 1835 to be unconstitutional, in this, that it suspends a vested right to collect the tolls without due process or "due course of law," as it is expressed in our Constitution. That its rights are passed upon and judgment given without a trial, without witnesses, without a jury, in secret, without any of the forms common to courts of justice, without the privilege of appearing by its agents or counsel. "Due course of law" undoubtedly

means in due course of legal proceedings, according to those rules and forms which have been established for the benefit of private rights. 12 N. Y., 209. Mr. Justice Johnson, of the Supreme Court of the United States, in the case of *Bank of Columbia* v. *Oakley*, 4 Wheat., 235, has stated the meaning of these terms so accurately and truly as to defy criticism. "That they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." "A hearing before condemnation and judgment before dispossession." Whatever may be the powers of the Legislature over remedies or purely remedial laws, no case, I presume, can be found in which this doctrine has been carried to the extent that the Legislature could divest rights without a hearing, and condemn the property of a party unheard, or otherwise affect him in his person or property. The intelligence of the present age denounces such absolute and arbitrary action of government as tyrannical, and refers it to that people whose fundamental laws are based upon unquestionable and absolute monarchy.

While this Act is subject to much and severe criticism, I shall refrain from further comment upon it, unless there are no other causes upon which a decision can be rested for the present.

The respondents have demurred to complainant's bill, and the cause is now being tried on demurrer, in the attitude of the pleadings, all the statements of

the bill are taken as true. Now, what are these? The turnpike company says in effect that its road is not up to the requirements of the law. I think this is fairly inferable from its allegations, but it says that the Legislature heretofore, and immediately after the war, passed an Act, which is set out in the bill, as follows: "That with a view to relieving the traveling community generally, and the incorporated turnpike companies of the State, permission is granted said turnpike companies to collect tolls at their several gates, the proceeds of the same, after paying expenses of collection, shall be appropriated to the repair of said roads until the same are made equal to the requirements of the original charter, when this Section shall cease to have any further effect."

It is claimed that the intention and effect of this Act was to pardon the roads from all penalties, notwithstanding their unlawful condition, provided the companies devoted all the net profits to the improvement of the roads. This the Legislature would certainly have the power to do. After the close of the late war, when all or nearly all the roads of every description were out of repair, falling far short of that condition required by the law, and when there was but little inclination or ability on the part of the stockholders to rebuild them, and when probably each had forfeited its charter and stood at the mercy of the State to end their existence, it was a question addressed to the wisdom of the Legislature, and the

policy to be pursued towards these companies, in view of the wants and necessities of the people of the State, whether they should cease or be continued, and if the latter, on what terms. The Legislature might have required each company, on pain of forfeiture, to put its road immediately in that state of excellence required by their charters, or it might have allowed them to do this within any given time. It refused to apply this rigorous rule, but on the contrary, enacted that said companies might have an indefinite time, provided they would apply all the net profits of the roads to the improvement of the same. This legislation was had in view of the fact that the roads were not in the required condition, and its intent and inevitable effect was to pardon the companies and waive the enforcement of all penalties against them. Certainly, after the passage of this Act, no company could have been indicted because its road was out of repair, nor could the commissioners have opened the gates; for this latter act would have been to deprive the companies of that very toll, the net profits of which the Legislature directed should be applied to the improvement of the road. 'T is needless to ask how the net profits of the toll could be applied to the improvement of the roads if the commissioners could open the gates and stop the collection of the same? The Legislature, beyond all cavil, intended to pardon the companies so long as they used the net profits of the roads to their improvement. The use of the net profits, then, was a

condition and proviso of the pardon, and any company failing so to apply the net profits waives the benefit of the pardon, and can not insist upon it. No person is bound to accept a pardon, and pardons can as well be upon conditions as unconditional, and a person claiming the benefit of a conditional pardon must show that he has accepted and performed all the conditions annexed.

Now this brings us to the allegations of the bill, and this alleges that the entire proceeds of the road, and more, have been devoted to this required purpose. Now, in the present state of the pleadings, the allegation is to be taken as true, no answer being before the Court, and therefore no denial of this fact. If this company has devoted all the net proceeds of its road, as required, and still with these expenditures the road has not reached the condition of excellence required by the charter, then the commissioners did wrong to open the gates. But the question here arises, was it the business of the commissioners to ascertain whether the net proceeds had been thus applied, and if the company, upon application, refused to disclose these facts, was it then the duty of the commissioners to throw open these gates for this refusal? This is assuming that the commissioners did not throw open the gates *solely* because the road was out of the required state of repairs, but for this cause, added to the fact that the company refused to make the requisite disclosures of expenditures to them. The duty of the commissioners, as declared by § 1277,

is to "see that the same (turnpike roads and toll-bridges) are kept in such repair as is required by law." By § 1282 it is declared that "whenever, in the opinion of a majority of said superintendents, any road or bridge shall manifestly be in *bad condition*, they may open the gates of such public way until it is put in good order and condition." This latter Section is certainly loosely drawn, and leaves a wide margin for discretion on the part of the superintendents. What is a "bad condition," or what is "good order and condition" for a road? More relative or uncertain terms could not certainly have been used. However, aided by the first Section, these terms have a certain and definite meaning, and must be held to mean such "repair as is required by law," or the *charter*, which is the law to them, and beyond this the State can exact nothing. A higher excellence the State did not contract for, and has no power to demand. These commissioners, then, are required to see that the roads are kept up to the demands of their respective charters, and to open the gates if they are not so kept. By this Act these superintendents or commissioners could look alone to the state of repair the road was in, and upon this hinged the question of opening the gates. It was not enjoined upon them to ascertain how much money had been expended upon the road; whether the expenditures exceeded or fell short of the net profits of the roads. This is nowhere made their duty by express language. Nor is it made their duty to see

that all the laws relative to turnpike roads are complied with, then their sole superintendence relates to the condition of the roads—to be ascertained upon personal inspection. If it is to be held that the commissioners' powers were enlarged by the Act of 1865, and that by this Act it became their duty to ascertain whether the companies were expending all the net profits in the improvement of their respective roads, this certainly is to be derived by implication, because it is not thus written down and expressed in the Statute; and this is also applicable to the power to throw open the gates because of the failure to disclose the application of the profits—this is also not written down or nominated in the Statute. Neither the commissioners nor their duties are referred to in the Act of 1865, and their existence is not inferable from anything in that Act. Did the Legislature intend then to confer upon them the power to call before them the officers of the roads and examine them touching the receipts and expenditures of the companies, and if their summons were disobeyed, then give them the penal power of opening the gates and declare a *quasi* forfeiture? or did the Legislature reserve this power to the grand juries and criminal courts? If it has become evident that a company is receiving a larger amount of tolls than it is appropriating to repair its roads, or that it is not honestly devoting its proceeds to this purpose, it is the duty of the grand jury to indict them for it. On such a trial the State could show that the road was not

up to the required condition; the defendant could not plead and rely upon the pardon in the Statute of 1865, without showing that he or it had accepted the benefits of the Act, and performed all its conditions and requirements. I refer to this to show that if a company is not complying with the law, the State and citizens are not without remedy, efficient and unquestionable, and far superior in reference to respect for rights of all parties than to leave the matter in the hands of superintendents whose powers are questionable—to be gathered by implication—and which, if it be decided against them, exposes them personally to the perils of dangerous litigation.

Has not the State the power, through its attorney, to proceed at once against any such delinquent road for a forfeiture? What defense could it make to such a proceeding? The only evidence the State would have to adduce would be to show the condition of the road, and the company would have to deny the condition of repair, or admit it and take shelter under the pardon of the Act of 1865, and to do this it would be required to show a full compliance with all the terms of the pardon, to-wit: that the net profits had been honestly applied to repairs. In either case the burden of the proof of the application of the profits. would be upon the company. So here we have full, complete and ample remedy in the regular and constitutional tribunal to correct all abuses, without exposing the commissioners to the danger of serious personal action for damages, if it

should be determined that in the discharge of their complicated duties, involving grave questions of constitutional law and facts, they have acted erroneously. For if it should turn out that the Act of 1835 is unconstitutional, it would afford them no shelter against a suit for damages, in which the company would recover such sum as the gates might have yielded to it during the period they were unlawfully closed, amounting in this case to several thousand dollars per year. Whatever may have been the motives that prompted this litigation (and much has been said upon this point), I have so far, and shall consider both parties as actuated by the highest motives of honor—the one to discharge the duties of a public trust, and the other to insist upon the enforcement of the laws governing private rights. Certainly the effect of this litigation is to transfer from the shoulders of the commissioners grave and serious responsibilities. I shall overrule the demurrer.

Felix H. Mays and Wife *v.* Elisha C. Wherry.

# Felix H. Mays and Wife *v.* Elisha C. Wherry.

Execution sale of land. *Several parcels sold in gross. Sale void.* If two distinct tracts or parcels of land, not contiguous, nor beneficial, the one to the other, in the uses for which they are respectively adapted, be levied and sold in gross—that is, sold altogether in one sale—and purchased by the plaintiff in the execution, such sale is a fraud upon the execution debtor, and *absolutely void.*

Case cited: Winters & Cross *v.* Burford, 6 Cold., 328.

FROM DAVIDSON.

Appeal from the Circuit Court. Nathaniel Baxter, Judge.

Berry & Lea for Felix H. Mays and wife.

Smith, Baxter & Allison for E. C. Wherry.

Deaderick, J., delivered the opinion of the Court.

Plaintiff brought ejectment in the Circuit Court of Davidson County, against defendant, for a lot in Edgefield. The facts on which the case is to be determined are as follows: Elizabeth L. Owens obtained judgments against Wherry in the Davidson Circuit Court for about $975, on which executions issued and were levied on the lot in controversy, and on seven acres of land south of Nashville, on the Murfreesboro Pike. The two parcels of land were put up together and sold in gross by the Sheriff, when plaintiffs in the judgments became the purchasers of

both lots, at $975, the amount of her executions. After the expiration of two years the Sheriff executed a deed to Elizabeth L. Owens, for the two parcels of land. Plaintiffs rely upon this deed for their title to the lot sued for, by which it appears that the title was vested in Elizabeth L. Owens, and there is no evidence in the record showing how the title was divested out of Elizabeth L. Owens and vested in Felix H. Mays and Elizabeth L. Mays. We may conjecture that Felix H. Mays intermarried with Elizabeth H. Owens, and thereby the title was vested in plaintiffs, but we can not supply the defect in the evidence, especially as the bill of exceptions is said to contain all the evidence. But as no notice is taken of this defect in the evidence in the proceedings below, we infer that its absence from the bill of exceptions was an inadvertence not observed by either party. The cause was decided in favor of the defendants, upon instructions given to the jury as to the legal effect of a sale in gross by the Sheriff of several distinct tracts of land, especially when purchased by the plaintiff in the execution. The instructions on this point were as follows: "If two distinct tracts or parcels of land, not contiguous nor beneficial the one to the other, in the uses for which they were respectively adapted, and were levied on and sold in gross, that is, sold altogether in one sale, such sale would be a gross fraud upon the rights of the defendants in the execution; would be oppressive and absolutely void

especially if the plaintiff in the execution became the purchaser."

Under this instruction the jury found for defendant, and it is now insisted for plaintiffs that the construction was erroneous. It is not denied that a sale by a Sheriff of several distinct and separate parcels of land together, in one lot, for an aggregate price, would be voidable by the debtor; but it is argued that such a sale would not be absolutely void. This question was considered in the case of *Winters & Cross* v. *Burford*, 6 Cold., 328, in which the opinion of the Court was delivered by Ellett, special Judge. In that case the purchaser of several separate lots sold in gross, petitioned for a mandamus to compel the Sheriff to make deeds. As it was incumbent on the petitioner to show a clear right to have deeds executed, the Court held that if the sale was only voidable, the mandamus could not be granted. Hence they say: "It is unnecessary to say whether such a sale would be void on general principles." But they add: "We incline to think that such a sale ought to be regarded as fraud on the debtors, and therefore void." After citing many authorities to show that such sales are at least voidable, they refused the mandamus on that ground. But the Court say they "are prepared to go farther," and then they refer to and comment on the provisions of the Code securing to debtors the right "to redeem the whole, or any separate and distinct parcels of the land sold." And they conclude

that the statute must be construed to require, as a condition of the validity of the sale, that each distinct parcel shall be put up and sold by itself."

The soundness of this conclusion is strongly illustrated in the case before us. The debt is about $975. The seven-acre lot lying south of Nashville is shown to be worth from $1,700 to $2,000. The lot in controversy in Edgefield is worth $400 or $500; both lots are sold together for $975, and the debtor fails to redeem. The fact that the debtor has failed to redeem is now relied on as evidence of acquiesence on his part. It seems to us rather to furnish evidence that he was unable to redeem both tracts, and being cut off by the sale in gross from redeeming separately, he was unable to redeem at all. We therefore concur in the conclusion arrived at in the case of *Winters & Cross* v. *Burford*, and are of opinion that the charge of the Circuit Judge is substantially correct. The judgment is affirmed.

## JONATHAN DILLARD *v.* G. J. CLEMENTS *et al.*

1. PRINCIPAL AND AGENT. *Disclosure of Agency Necessary. When.* Where a party accepts Confederate money in satisfaction of a judgment assigned to him as agent, without disclosing his agency, the payment is valid, and such satisfaction by the assignee of the judgment can not be set aside at the instance of the assignor.

See Glass *v.* Davidson, 1 Baxter, 47; Story on Agency, § 430.

FROM SMITH.

Appeal from the Circuit Court. ANDREW McCLAIN, Judge.

S. M. FITE for Jonathan Dillard.

W. W. WARD and A. A. SWOPE for Clements.

Opinion by the Court.

On the 8th of September, 1860, J. Dillard recovered a judgment before a Justice of the Peace for Smith County against G. J. Clements, for $70, which was stayed by J. E. Clarke and Charlotte Clements. Dillard immediately assigned the judgment on the Magistrate's docket to Robert Traywick. After the stay had expired, Traywick accepted payment from G. J. Clements in Confederate money, and entered satisfaction thereof on the docket.

In 1866 J. Dillard applied to the Magistrate and obtained the issuance of a *scire facias*, requiring the defendants in the judgment to show cause why the

entry of satisfaction on the docket should not be set aside and vacated, upon the ground that the alleged payment was wrongful and illegal. J. Dillard failed to appear and prosecute his *scire facias*, whereupon the Justice of the Peace gave judgment for the defendants.

Afterwards J. Dillard filed his petition for a writ of *certiorari*, and brought the case into the Circuit Court. After a motion to dismiss the petition was overruled, the question whether the payment of the judgment was valid or not, was submitted to a jury, who, under the charge of the Court, found that the payment was invalid; and thereupon judgment was rendered against the defendants, for the amount of the judgment of the Justice of the Peace.

At a subsequent day of the term the Judge set aside the verdict of the jury and the judgment thereon, and quashed the *scire facias*. From this judgment J. Dillard has appealed.

The first question in the case is, whether the Court erred in overruling the motion to dismiss the petition for *certiorari*. The petitioner, after stating the judgment as already set out, proceeds to state the merits of his case, as follows:

"The said judgment, though in the name of petitioner, was intended to be for the heirs and distributees of William Dillard, deceased, and was handed over by petitioner to A. Dillard, the agent of some of said distributees, and he made one Robert Traywick agent to attend to the collection of said judg-

ment, and said judgment was assigned on the docket to allow him, said Traywick, to manage the same, though he had no interest whatever in said judgment, and has none yet. Some time afterward said Traywick, without any authority whatever from any person interested in said judgment, or said A. Dillard, the agent of the distributees, to whom the same was to be paid, or from your petitioner, accepted payment from said Clements on said judgment in Confederate Treasury notes."

The petitioner proceeds to give a good reason for failing to appeal from the judgment of the Justice of the Peace, but nowhere states that the defendant in the execution, Clements, paid the Confederate Treasury notes with a knowledge that Traywick was but the agent or trustee for the collection of the money for A. Dillard. According to the statement in the petition, J. Dillard, in whose favor the judgment was rendered, divested himself of all interest in and control over the judgment, by transferring the same on the docket to Traywick. By this transfer Traywick was vested with a right to manage and control the collection of the debt as if it had been his own. Under such circumstances the payment made by Clements was valid and binding, unless it had been made to appear that he had knowledge at the time that Traywick was only an agent or trustee for the collection of the money. The rule is thus laid down by Mr. Story, in his work on Agency, Section 430: "If the payments are received by the agent, accord-

ing to the ordinary course of business, or even if they are made out of the ordinary course of business, if the agent alone is known, or is supposed to be the principal, and the debtor has no notice of any claim by the real principal, the latter would be bound thereby."

As petitioner failed to charge notice on the defendant, Clements, at the time of making payment in Confederate money, we are of opinion that the petition ought to have been dismissed for the want of merits. This renders it unnecessary to notice the subsequent proceedings in the case, except to state that the Circuit Judge arrived at a proper conclusion, and the judgment is therefore affirmed.

Enoch Cunningham *v.* D. A. McGrady.

# ENOCH CUNNINGHAM *v.* D. A. MCGRADY.

1. JUDGMENT. *Assignment of. Attorney's lien for fee.* The assignee of a judgment takes the equitable title, subject to a lien which an attorney may have on the same for his reasonable fee.

Case cited: Hurst *v.* Means, 2 Sneed, 546.

2. SAME. *Same. Warranty of title implied.* The assignor of a judgment, who sells it for a valuable consideration, gives an implied warranty of title, and if there is a lien or incumbrance on it, he is bound to remove it, unless he relieves himself by contract.

See Perkins *v.* Perkins, 9 Heis., page 95.

FROM DAVIDSON.

Appeal from the Circuit Court. EUGENE CARY, Judge.

DEMOSS & MALONE for Cunningham.

GUILD & SMITH for McGrady.

DEADERICK, J., delivered the opinion of the Court.

In November, 1865, McGrady obtained a decree in the Chancery Court of Davidson County against Samuel Watkins, for $3,350, with interest from that date.

On the 11th of January, 1867, McGrady transferred, by written assignment, to Cunningham one-half of said judgment, specifying the date and amount. And on the 10th of October, 1867, he transferred, by written assignment, the other half of said judgment to Cunningham. The decree had been obtained by Francis B. Fogg, as solicitor for McGrady, and for

his compensation as such, he was entitled to $250, and had a lien on the judgment for its satisfaction. When the first half of the judgment was assigned nothing was said by either party about the existence of said lien; but when the assignment of the second half was made, Cunningham says, in his deposition, that McGrady told him that he had paid Mr. Fogg's fee. This, however, is denied by McGrady, who says in his deposition that nothing was said about the fee. McGrady also says that some short time after the second assignment, Cunningham called upon him, and said that he could not get paid on the first assignment until Mr. Fogg's fee was paid; that he had no idea that the fees would have been more than $50, and that he thought McGrady ought to pay the fees. McGrady says that he refused to pay the fees, telling Cunningham that he had nothing to do with it. Thereupon Cunningham paid the fee of $250 to Mr. Fogg, and brought this suit against McGrady, to recover the money back.

The case was submitted to the Court without the intervention of a jury, and the Judge, upon the facts stated, held that McGrady was not responsible. From this judgment Cunningham has appealed to this Court.

It is clear that Cunningham took the equitable title to the judgment, subject to Mr. Fogg's lien, for his compensation. *Hurst* v. *Means*, 2 Sneed, 546. He could not receive the money upon the judgment, without first satisfying the lien thereon. Whether or not he is entitled to recover from McGrady the

amount paid to Mr. Fogg depends upon the character of the contract by which he purchased the judgment.

By the sale of the judgment by McGrady to Cunningham there was an implied warranty of title, and if there was a lien or an incumbrance on the judgment, McGrady was bound to remove that incumbrance, unless there was something in the contract by which Cunningham was bound to remove it. We infer from the proof in the case that Cunningham, in estimating the amount that he was willing to pay for the judgment, took into consideration that there was a fee to be paid to Mr. Fogg. It appears that he discounted the judgment at eighteen per cent., and when he called upon McGrady about Mr. Fogg's fee, he expressed no unwillingness to pay a fee of $50, but as the fee was $250, he thought McGrady ought to pay it.

We think it clear, from this proof, which is uncontradicted, that Cunningham purchased the judgment with the understanding that Mr. Fogg's fee was to be paid by him. We are, therefore, of opinion that the judgment of the Circuit Court is correct, and we affirm it.

Enoch Ensley *v.* Mayor and City Council of Nashville.

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## ENOCH ENSLEY *et al.* *v.* THE MAYOR AND CITY COUNCIL OF NASHVILLE.

1. CORPORATION. *Liable for acts of agent. When. Military government de facto.* While the city of Nashville was under military control, its Mayor and City Council constituted a government *de facto*, and the corporation is liable for property taken from individuals, of which it enjoyed the benefits, though its agents, by whose authority the act was done, were not legally elected in pursuance of the City charter.

Case cited: Cole *v.* Corporation of Nashville, 4 Sneed, 166.

2. TRESPASS UPON LAND. *Measure of Damages.* The measure of damages for felling and carrying away trees from a tract of land, is their value as they stood upon the land, and if their removal impaired the value of the land, damages may be had for such injury.

Case Cited: Wheless *v.* Second National Bank, 1 Baxter, 469.

FROM DAVIDSON.

Appeal from the Circuit Court. EUGENE CARY, Judge.

NEIL S. BROWN and A. G. MERRITT for Ensley.

JOHN LELLYETT for the City.

TURNEY, J., delivered the opinion of the Court.

It was error to allow the entries in the memorandum book of J. L. Stewart to be read. If the wood was the property of plaintiffs on the land, and was removed without their consent, that removal did not deprive them of the right of property; they could pursue the property and recover it in specie, or its value at the

place when found. In this action, however, the measure of damage is the intrinsic value of the timber on the land to the premises, and which is not confined, under the facts developed by this record, to the absolute value of the timber. The question is, What was the timber, as it stood upon the ground, reasonably worth to the plaintiffs? What loss have they actually sustained by the felling and removal? To confine the inquiry to the value of wood as fuel, is entirely too limited; the timber of a swamp is worth as much. It may be the timber as standing was the main item of value, as if it suited the land for building lots, or might be converted into lumber for building or manufacturing material, etc. In addition, the plaintiffs, if entitled to recover, are entitled to compensation for all injury done to the land, by reason of felling the timber, or otherwise.

It is insisted that the city government was not organized under the charter, but appointed by a military Governor, and therefore could not bind the corporation, and only made themselves individually liable. The argument is not tenable; it is in proof, the wood was used at the water-works, in the city engines, distributed to the poor, sold to those able to purchase, and in other ways beneficial to the corporation, without objection or complaint by the corporation, but by its direction. The Mayor and Aldermen and common council were a government *de facto*, so far as the results of the appropriation of the wood were involved or attained. It was absolutely neces-

sary that that government should exist, as it was in form constituted, and it was as absolutely impossible for it to exist at all, except at the will and pleasure of the military Governor. It performed all the functions of the government, gave relief to the people, carried on its public works, and can not now be allowed to take advantage of its own wrong, in having enjoyed its full benefit, and then refusing to account to those from whom it derived the means.

Corporations can only act through their agents, and must be held accountable for their acts, otherwise citizens may be ruined through irresponsible persons. In *Cole* v. *Corporation of Nashville*, 4 Sneed, 166, Judge McKinney says: The general doctrine is now well established both in England and this country, that corporations are liable for the wrongful acts and neglect of their officers and agents in the course and within the scope of their employment, upon the same ground, in the same manner and to the same extent that natural persons are liable for the wrongs and negligence of their servants. This doctrine proceeds upon the ground, that as an aggregate corporation can only act through the instrumentality of its officers and agents, the act of the officer or agent in the course of his employment is the act of the corporation. "It is equally well established that a corporation is liable for wrongful acts done by its direct command or assent." These principles are conclusive of this case. It is not denied that the timber was cut, hauled and appropriated by the direct

command of the corporate authorities. The acts of Congress and "so-called military orders have nothing to do with the case. The orders are simply permits, granted at the request of the Mayor, and do not so much as specify the property to be taken. The fact that the military authority would have cut the timber, or that certain witnesses, claiming to know that it was a military necessity that the timber should have been felled, does not excuse or justify defendants. A private citizen is not excused for the murder of one under sentence of death, though he took his life at the very moment the officer of the law would have done so. Belligerent rights can not be assumed and employed at the will of the private citizen or the civil authority of a city.

Reverse the judgment.

J. T. Harris. Pl'tiff in Error, *v.* T. B. Austell, Def't in Error.

## JOHN T. HARRIS, Plaintiff in Error, *v.* T. B. AUSTELL, Defendant in Error.

1. PROPERTY EXEMPT BY LAW. *Replevin lies for. When.* Where property exempt by law is sold under an execution, replevin will lie for recovery of same.
   Case cited: Wilson *v.* McSween, 1 Head, 17.
2. SAME. *Same.* Where the foundation of a judgment is a note made prior to the Act of March, 1860, the defendant in execution can only recover such property as was exempt anterior to said Act.
3. SAME. *Same.* Where neither the verdict of the jury nor the judgment of the Court specify the property sued for, in an action of replevin, such verdict and judgment are void for uncertainty.
   Case cited: State *v.* Haggard, 1 Hum., 393.

FROM COFFEE.

Appeal from the Circuit Court. WILLIAM P. HICKERSON, Judge.

J. B. FITZPATRICK for Harris.

C. A. SHEAFE for Austell.

BURTON, Special J., delivered the opinion of the Court.

This is an action of replevin brought by Austell against Harris in the Circuit Court of Coffee County. It appears from the bill of exceptions, that on the 4th day of January, 1862, Logan and Layton obtained judgment before one Rutherford, a Justice of Coffee County, against Austell, the defendant in error,

in the sum of $78.57, on a note executed by said Austell on the 9th of February, 1859, and by him endorsed to said Logan and Layton. On the 31st day of January, 1866, a little more than four years after the rendition of the judgment, an execution was issued on this judgment, and came to the hands of one Linton, a constable, and was by him levied upon "one bay mare and one sorrel mare," as the property of Austell. Five days after the levy Austell gave bond to have the property forthcoming for sale on the 10th of March thereafter, at his (Austell's) house. The property was sold, and bought by the defendant, Harris, on the said 10th day of March, 1866. Three days thereafter Austell brought this suit against Harris, the plaintiff in error, and purchaser of the mares.

The declaration contained two counts, in each of which the property sued for was described as follows: "One sorrel mare about nine years old," etc., and "one bay mare about," etc. The only variation in the counts being, that in the second count the plaintiff alleges that he was entitled to hold the property exempt from execution, he being the head of a family, engaged in agriculture, and having no other horse or yoke of oxen than those levied upon. The Court, in instructing the jury, told them very properly, in substance, that if the note, which was the foundation of the judgment, was made before the Act of March, 1860, which first exempted an "additional horse" to the one already exempt by the Code, then the plain-

tiff could claim only one horse as exempt from execution.

Under this charge the jury returned a verdict, that as to one of the mares, they find the issue in favor of the plaintiff, and assess his damages for the detention at five dollars. And further say, that as to one of the mares, they find for the defendant, and assess his damages at 33.75. And further, that they assess the value of said mare at $125. The Court gave judgment in accordance with this verdict, and adjudged all costs against the defendant.

It appears here, that neither in the verdict nor judgment of the Court, is it ascertained which of the two mares sued for was recovered by the plaintiff. He could not tell whether he was to restore to the defendant the bay mare or the sorrel mare; nor on the other hand, would the defendant know which one of the two mares he was bound to receive.

We are satisfied that this verdict and judgment are void for uncertainty, and the case must be reversed.

Of course it is easy to anticipate the difficulty of proceeding in this case, when it is remanded for a new trial.

The facts of this record suggest several questions that would arise on a proper trial of the case. It has been decided that the defendant in an execution, contrary to the general rule, might replevy property seized under it, when the property so seized was exempt from this process.

J. T. Harris, Pl'tiff in Error, *v.* T. B. Austell, Def't in Error.

The case of *Wilson* v. *McQueen* first decided this question, and the decision has been adhered to. In that case the opinion assumes that the defendant, when he levied the execution, well knew that the property was exempt, and it may be questioned whether this is not still a proper qualification of the right of the defendant in the execution to sue. The case arose also before the adoption of the Code, before which time the statutory law contained two provisions, which are dropped out of the Code, and which have an important bearing on the case in hand. One provision was, that it may be lawful for the defendant "to set apart" the property exempt, and the other gave expressly an action against the officer for the violation of the provisions of these acts. It may be doubted whether, notwithstanding the repeal of both of these provisions, the action of replevin should lie against the officer at all, unless the defendant made his selection as to which horse he would retain. Before the Code, in the case of the *State* v. *Haggard*, 1 Hum., 393, Judge Green, discussing these acts of assembly, says:

"Whether, if there had been several horses, the officer could have taken them all, unless the defendant in the execution had selected and set apart one for himself, is a question we need not now decide. In such case, the right to select and set apart one of several horses, would give the defendant in the execution the right to take the best and most valuable of these animals; but it does not follow that

because he may select and set apart, that in case he is absent when the levy is made, or may fail to make such selection from any other cause, he forfeits his right to the benefit of these acts. How this may be, it will be time enough to decide when the case may arise."

We express no opinion upon the question suggested, but they are referred to because the facts of this case call for a decision of them on another trial.

The judgment is reversed, and the cause remanded to the Circuit Court of Coffee County for a new trial.

W. D. Moorehead, Ex., etc., *v.* C. A. Diemer *et al.*

# W. D. MOOREHEAD, Executor, etc., *v.* C. A. DIEMER *et al.*

1. WILLS. *Insolvent proceedings. Duty of Executor. Practice.* The property, real or personal, of a non-resident decedent, situated or within the jurisdiction of this State at the time of his death, may be administered under our insolvent laws, and this although the estate of the decedent be solvent at the place of his domicile in another State.

   Case cited: Gilchrist *v.* Cannon, 1 Cold., 581.

2. SAME. *Same. Sale of property for specific debts may be set aside by creditor. When.* The sale of property for the satisfaction of specific debts by the executor, during the first six months after letters of administration, with knowledge of the insolvency of the estate, does not preclude a creditor, standing by for two years, from filing his bill under the insolvent laws of this State for distribution. A creditor of the estate being the purchaser in this case, was allowed to retain the property at cost, or have the same sold for *pro rata* distribution, having paid the full value at time of sale.

FROM LINCOLN.

Appeal from the Chancery Court. JOHN P. STEELE, Chancellor.

BRIGHT & SON and EDWARD H. EAST for Moorehead.

LAMB & TILLMAN, E. COOPER and HOLMAN & HOLMAN for Diemer.

BURTON, Special J., delivered the opinion of the Court.

David F. Robertson died in the State of Mississippi, where he was then residing, in the year 1863,

having made a will, whereby he nominated his wife, Susan, his son James, and James B. Lamb, executrix and executors thereof. His wife and son qualified under the will, the other executor named, as we suppose, having renounced.

The testator owned a considerable estate in Mississippi, and also died the owner in fee of the tract of land in Lincoln County, Tenn., of 416 acres, the subject matter of this litigation.

By his will he made provision for his wife during her life, and then made a bequest of $5,000 to his name-sake, David Robertson Bonner. His son James is the residuary legatee and devisee of his whole estate.

By a codicil, executed some time after the date of his will, he directed that if it should become necessary to sell any of his property to pay debts, then, and in that case, the Lincoln county land already mentioned was to be sold for that purpose, and full power is given to his personal representatives to sell and make conveyance.

It further appears that the executrix and executor had the will of their testator recorded in Lincoln county, in pursuance of the provisions of the Code for the probate and recording of wills executed in other States. The testator, at the time of his death, owed debts to a large amount to citizens of Lincoln county, Tenn. To the defendant, Diemer, and other creditors made defendants with him, testator was indebted in the sum of $14,297 24.

The executrix and executor qualified and took out letters testamentary in Lincoln County also; and some short time thereafter sold and conveyed the tract of land in Lincoln County to the defendant, Diemer, by deed absolute on its face. There is no doubt, however, that this deed was made to satisfy the creditors whose debts as above recited amounted to the sum of $14,297.24, as that is the sum stated as the consideration on the face of the deed, and in fact, it is substantially admitted in the pleadings that such was the nature of the transaction. But at the time this deed was made the complainant, in right of his testator, held a note on the testator, David F. Robertson, for the sum of $2,385.98, dated January 11th, 1859, and due one day after date. This note was credited by $1,000, as of October 18th, 1862, the balance with interest being unpaid. For this debt no provision was made in the transaction with defendant Diemer, or otherwise, though the existence of the debt was well known to the personal representatives of Robertson when the deed was made. In fact, it appears from the answers in the cause that Moorehead was requested to become a party with the other creditors, and receive satisfaction of his debt in this way. But he declined to do this, preferring, as is said, to look to the general estate for the satisfaction of the debt. And this, perhaps, it was his duty to do, as the respondents admit that the land was only worth about $10,000,

whereas it was taken as above shown in satisfaction of more than $14,000 of indebtedness.

Under this state of facts the complainant, Moorehead, on the 16th of June, 1868, filed his bill in the Chancery Court of Lincoln County against the executrix and executor of Robertson, and against Diemer and the other creditors for whom he purchased the land.

The object of the bill is to have the deed to Diemer recalled, and to have the estate of David F. Robertson, situated in the State of Tennessee, administered as an insolvent estate, and the proceeds of the land distributed *pro rata* among the creditors, himself included. And the question made in the record is, whether the complainant is entitled to the relief sought by his bill. The Chancellor was of the opinion that he was, and so decreed, and the defendants have appealed to this Court.

We may remark in the first place, that there is no doubt that the property, real or personal, of a non-resident decedent, situated or within the jurisdiction of this State at the time of his death, may be administered under our insolvent laws, and this although the estate of the decedent may be solvent at the place of his domicile. 1 Cold., 581. Indeed, this is not questioned, but the bill is resisted on other grounds. It is said that the executors had full right to sell the land to Diemer, and that they did

sell it for more than a full price, in discharge of bona fide debts due from their testator. And that to set aside this conveyance to Diemer, would operate greatly to the prejudice of the estate of Robertson. And the complainant, it is said, having stood by for two years after the sale, is in no attitude to ask the aid of a Court of Chancery to set aside a conveyance made with his knowledge and approbation. While it is true that there is not the least ground to impute fraud or intentional misconduct, either to the executors or creditors of Robertson's estate, or to doubt that the sale to Diemer was made with the intention of discharging the first debts of the estate, we do not think, on the other hand, that the complainant has done any thing to repel him. The statement that he knew of and approved this sale to Diemer, at and before the deed was made, is made in the answers, but not sustained by any proof. Nor is it responsive to any allegation in the bill, and even if it were taken to be true, we are not satisfied that it would estop him.

One thing is very apparent, that when the defendants made this sale and purchase, they knew that the estate of Robertson, situated in Tennessee, was insolvent, and they further knew that the executors were applying the whole of the estate, so situated in Tennessee, to the discharge of other debts to the exclusion of complainant. Now when Robertson's executor and executrix took out letters of administration from a Court of Tennessee, we think they were

bound to administer the effects within the jurisdiction of the State according to its laws, although they were also clothed with power of administering the general estate by the Courts of their testator's domicile. And if so, it was their duty to administer it under the insolvent laws, without reference to the solvency or insolvency of the general estate.

It is true that, in the case of *Gilchrist* v. *Cannon*, already referred to as establishing the applicability of the insolvent laws to a case like this, a creditor administered in our forum, while in the case in hand the executor and executrix of the domicile are the personal representatives, but this can make no difference when the reason of the doctrine is considered. It is an admitted principle of international law that every State has the right to control and dispose of property actually within its jurisdiction; and it is the duty of every State to protect the rights of its own citizens and to aid them in the recovery of their just debts, without the necessity of resorting for satisfaction to the distant forum of the original administration. 1 Cold., 587. And such the Court determined was the reason and policy of the insolvent laws then in force, and which are substantially brought forward in the Code.

It was then the positive duty of the executor and executrix in this case, knowing as they did the insolvency of their testator's estate in Tennessee, to make suggestion of the fact to the County Court and notify all the creditors to bring for-

ward their claims, the object of these laws being to distribute insolvent estates ratably among the creditors. It is true that the complainant as creditor might have made the suggestion of insolvency, but then he would do so at the hazard of incurring a bill of costs if the estate proved solvent. Besides, the insolvent laws contain a positive inhibition against the payment of any debt by the administrator or executor within six months from the grant of his letters, under the penalty of being liable to each and every creditor for his ratable share of the insolvent's estate. Now in this case it appears from the decree, if admissible to look to it for that purpose, that all the Tennessee assets were applied in payment of part of the debts within a month from the grant of the letters testamentary by the County Court of Lincoln. And if this be so, there is little reason to impute laches to the complainant for his failure to take steps before the sale.

Our conclusion is that it is the duty of this Court to see that this real estate be administered for the benefit of all the Tennessee creditors. Certainly the provisions of the insolvent laws in this case have not been observed in these proceedings. As already intimated, we think that the complainant should have made suggestion of the insolvency to the County Court as at least a proper preliminary to the filing of a bill.

It was irregular and improper in his Honor,

the Chancellor, to order a sale of the land before the creditors had been brought in and an account taken. Nor do we think that it is equitable either to set aside the sale to the defendant, Diemer, absolutely, or to require him and the other creditors to account *pro rata* to the complainant and other excluded creditors, for the land, at the nominal price of $14,297.24. And we direct that Diemer and the creditors that he represents be allowed to retain the land at its real cash value at the date of their purchase, by accounting to the complainant and other Tennessee creditors, if such appear, for their *pro rata* of such cash value. Should the defendant, however, fail to elect or retain the land, then it will be held by the Chancery Court of Lincoln County as assets to be administered. The devisees of this land are already before the Court, and if it is thought important to his interest the legatee, James Robertson Bonner, may be made a party. There is no intimation in this record that any assets other than this land, situated in Tennessee, have come to the hands of the administrator; but complainant is of course entitled to an account of them, if such there be.

The decree of the Chancellor will be modified, and the cause remanded, to be proceeded in in accordance with this opinion. The complainant will pay one-half of the costs in this Court, and the executor and executrix the remaining half. The costs of the Court below are not adjudged.

McCall *et al. v.* Flippin, Adm'r, *et al.*

# McCall *et al. v.* Flippin, Adm'r, *et al.*

1. Resulting Trust. *How created. Use of Ward's money by Guardian.* A resulting trust can only arise out of the original transaction when title is taken; such a trust does not exist in favor of wards whose money has been applied by their guardian in payment for land, where the title has fixed in such purchaser previous to his guardianship.

   Cases cited: Moffit *v.* McDonald, 11 Hum., 460; 1 L. C. in Eq., Notes to Dyer *v.* Dyer; Gee *v.* Gee, 2 Sneed, 395; Story's Eq. Jur., § 1258; Sanford *v.* Weedon, 2 Heisk., 76; Perry on Trusts, §§ 127, 135; Caplinger *v.* Stokes, Meigs' R., 175.

2. Same. *Same. No lien in favor of Ward. When.* When land has been purchased by guardian with minor's funds, no lien exists in their favor, in the absence of resulting trust.*

FROM SMITH.

Appeal from the Chancery Court. Wm. G. Crowley, Chancellor.

Head & Sons for McCall *et al.*

A. A. Swope and S. M. Fite for Flippin *et al.*

McFarland, J., delivered the opinion of the Court.

About the 4th of April, 1856, A. S. Bains purchased at a Chancery sale, a tract of land sold under a bill for that purpose, in the settlement of the estate of A. Moore, who had died seized and possessed of the land. The price to be given amounted to $10,185; $202 was

* This case is reversed, the Court, upon its own motion reviewing and citing *Gannaway v. Tarpley*, 1 Cold., 572, and *Turner v. Pettigrew*, 6 Hum., 438, say: Yielding to the authority of these cases, we are brought to a conclusion directly opposite to the result of the foregoing opinion. Yet I am, myself, of the opinion that upon principle the distinction taken in the case of *Gannaway v. Tarpley* is not sound."—McFarland, J.

paid in hand, and two notes, each for $4,990 50, due severally in one and two years were given for the remainder. The sale was confirmed and the title vested in Bains, August, 1856, but a lien retained to secure the unpaid notes. About March, 1857, said Bains was appointed guardian of the complainants, who were the minor heirs of David McCall, deceased, and it is alleged by them that said Bains received a large amount of funds due them, and with these funds paid said two notes given for the balance on said Moore tract of land. In the bill it is alleged that all of said two notes were paid with their funds, but in argument it is contended that at least a large part of said notes were so paid, and the balance paid probably with other funds. Bains died about 1863, and his estate was being administered as an insolvent estate by the defendant (Flippin) as administrator, when this bill was filed for the purpose of setting up in favor of the complainants a resulting trust in the Moore tract of land; and it is now urged for them that they are entitled to this relief, or if not, that they are entitled to a lien upon the land to the extent it may appear that their funds were used in paying for it. The question of fact as to the payment of the two notes with the funds of the complainants is earnestly controverted. The facts in proof are about as follows: The two notes were paid in several different payments, running from the 15th of April, 1857, to the 9th of November, 1858, when the last payment was made—$3,521 03, there then being a judgment for the unpaid balance on the notes. It is conceded in

argument by complainants' counsel that the weight of proof is that this last payment was not paid with the funds of complainant, but with funds that had shortly before that date come to Bain's hands as administrator of the estate of one Bridges. The evidence for complainants is that on the 12th of March, 1857, the day Bains was appointed guardian, Joseph Payne, the executor of the will of David McCall, deceased, turned over to said Bains $6,583.61 for his wards, coming from their father's estate. Payne, in his deposition, says that this was all in good cash notes, on good and prompt men, well secured. No notes or names, however, are specified. No account was ever given of these notes, nor were any notes or other securities found by the administrator corresponding with this fund, or in any way shown to be the fund of the minors. It is not shown that Bains ever loaned any money as the money of his wards. In his settlement he charged himself in general terms with an amount something like equal with the sum turned over to him by Payne.

It is insisted by complainant that these funds must have been used in paying complainant's land notes, for the reason that Bains had not, from any other source, the means to make the payments. In answer to this, the defendants undertake to show that Bains did have the means to make the payment outside of the funds of complainant. They show that he sold another tract of land owned by him, about two weeks after he bought the Moore land, for the

purpose of helping him to pay for the Moore land. That he also sold part of the Moore tract for the same purpose, and that he had other sources from which he might have received money. Without going further into details, we think the proof shows that he received in payment of other lands several sums which, from the dates, he might have used in paying the balance on the Moore land, and probably did so. But it does not clearly appear that he received from such sources an amount sufficient to pay said two notes in full. We will not undertake to specify amounts. Where the balance came from we can not say. There does arise a pretty strong inference that if he had any money of his wards he used it for this purpose, for it is proven that he said, shortly after he bought the Moore land, that he was going to become guardian of complainants, and their funds would be coming into his hands, and he could or would use it in paying for this land, and pay up the minors when they became of age. This is strengthened by the fact already stated that no other account is given of the notes turned over to him by Payne. Yet there is no proof that Bains actually collected on the notes turned over to him by Payne the amount specified. There is evidence that he collected $800 and upwards.

It has been often held that to establish a resulting trust, upon proof that the complainants' money paid for the property, the proof must be clear and satisfactory, or as expressed by this Court, the con-

science of the Court should be fully satisfied. 2 Heisk., 76. It is not enough to show that the party had such a fund that he might have so used. 11 Hum., 460.

From the proof we think there is no reasonable doubt that Bains did use complainants' funds in paying said two notes, but what part of said notes were so paid we can not now determine.

But complainants are not entitled to the land by way of resulting trust, conceding that their money paid these notes. A resulting trust must arise, if at all, out of the original transaction. A subsequent use of the complainants' money in paying for land previously purchased, when no such relation existed, will not raise the trust. "After the legal title has once passed to the grantee, it is impossible to raise a resulting trust so as to divest that legal estate by the subsequent application of the funds of a third party to the improvement of the property, or to satisfy the unpaid purchase-money. The trust must arise, if at all, at the time of the execution of the conveyance. See vol. 1 Leading Cases in Eq., Notes to *Dyer* v. *Dyer*, where the authorities are collected; *Gee* v. *Gee*, 2 Sneed, 395.

In this case Bains purchased the land, and was vested with the title before he became guardian for complainants, or received their funds. At the time he was vested with the title, no such trust attached to it, and, as we have seen, this could not result from the use of the money afterwards.

But it is argued that if the complainants are not

entitled to this relief, that they have a right to follow their money so vested in the land, and to a lien upon the land for the amount so used. The principle is stated by Judge Story as follows:

"Whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the original owner, or *cestui qui trust.*" Story's Eq. J., § 1258. "Thus, for instance, if a trustee, in violation of his duty, should lay out the trust money in land, and take a conveyance in his own name, the *cestui qui trust* would be without any relief at law. But a Court of Equity would hold the *cestui qui trust* to be the equitable owner of the land, and would decree it to him accordingly; not upon any notion that he had ratified the act, but upon the mere ground of a wrongful conversion creating *in foro conscientiæ* a trust in his favor." *Ib.*, § 1260.

Is this principle different from the doctrine of a resulting trust? It will be seen that Judge Nicholson, in *Sanford* v. *Weedon*, 2 Heisk., 74, in defining the three classes of resulting trusts, lays down as the first and most simple form the case stated by Judge Story above; and in *Moffit* v. *McDonald*, 11 Hump., 457, the above sections from Story's Equity Jurisprudence are referred to as the principle of a resulting trust, and in reference to the character of trust treated of by Judge Story as above, Judge Totten says the

trust must arise out of the relations between the parties and state of facts existing at the time of the purchase. It can not be raised by matters accruing subsequent to the purchase, and not in contemplation of the parties at the time."

The question is, can the complainants have a lien upon this land for the amount of their money used in paying the notes given for it, when they can not have a resulting trust set up in their favor to the land, for the reason already referred to?

If they were entitled to a resulting trust, then, as a general rule, they could elect to take the fund and have a lien declared upon the land to enforce it. But are they entitled to take such a lien in any case where they could not, at their election, take the land as equitable owners. In other words, is there any principle upon which they are entitled to a lien on the land different from the principle of a trust resulting from the use of their money in paying for it? We are aware of none. Now, are the complainants defeated upon the ground already stated that the trust did not arise out of the original transaction, that the trust did not attach to the land at the time the title was vested in Bains? In other words, did Bains convert their money into this land, or did he simply pay his debts with it? debts for which the land had already been conveyed to him?

In the late work of Perry on Trusts the subject is treated in a chapter headed "Resulting Trusts," in which the several classes of resulting trusts are dis-

cussed, and among others the cases where property is purchased and the title taken in the name of one person, while the consideration is paid by another, which the author illustrates as follows: "And so, if a person having a fiduciary character purchase property with the fiduciary funds in his hands, and takes the title in his own name, a trust in the property will result to the *cestui que trust*, or other person entitled to the beneficial interest in the fund with which the property was purchased. As if a trustee purchase with the trust fund and take the title in his own name, the trust results to the *cestui que trust*. If a guardian purchase with the money of his ward, a trust will result to the ward, etc." See § 127; Meig's R., 175.

After illustrating the doctrine further, and discussing its other incidents, the author, in speaking of this precise character of trusts, says: "The trust must result, if at all, at the instant the deed is taken and the legal title vested in the grantee. No oral agreements, and no payments before or after title is taken will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself." See § 135.

So it will be seen that this principle (that the trust must result, if at all, at the time the title is taken), is applied to the very case in hand, where the money of wards is sought to be followed on the ground that the guardian has invested the money in

lands, taking the title to himself. And in this respect there is no distinction between this and other sulting trusts; and there is no principle upon which the wards are entitled to a lien upon the land for their money, except upon the principle that in equity they are entitled to the land by way of resulting trust, in which case, at their election, they may have the fund and a lien upon the land to enforce it; but if the resulting trust be not established, they can have no lien upon the property. The question here is between complainants and other creditors. The notes in this case were a lien upon the land, but the doctrine of subrogation only applies as between parties standing in the attitude of principal and security. I am of opinion that the decree of the Chancellor should be affirmed.

## STAMPS *v.* BELL, Adm'r.

ADMINISTRATION. *Filing of claim. Withdrawal of. Is no abandonment. When.* Where a claim is filed in time, but is withdrawn because of the administrator's false representations of the estate's solvency, this is no abandonment, and the claim should be allowed if re-filed before distribution of assets.

Cases cited: Mohlier *v.* Zimmerman, 5 Hum., 62; Rains *v.* Rainey, 11 Hum., 261.

FROM LINCOLN.

Appeal from the Chancery Court. A. S. MARKS, Chancellor.

LAMB & TILLMAN for Stamps.

CARRIGAN & MOONEY for Bell.

JO. G. CARRIGAN for minors.

SNEED, J., delivered the opinion of the Court.

The complainant held a promissory note executed by the firm of Robinson & Moore. The defendant is the administrator of Robinson, who died after the execution of the note. The defendant qualified as the administrator in March, 1866, and suggested the insolvency of said estate in the following month of April. Upon said suggestion a notice was given thereof under the statute, and the claims against said estate directed to be filed by or before the 19th of October, 1866. The complainant filed his claim, and

record thereof was made in the office of the County Court Clerk on the 12th of October, 1867. At that time the debts had not been paid and the funds were yet in the hands of the administrator. The bill is filed to enforce the payment of the complainant's claim. The bill charges the foregoing facts, and that the complainant, after filing his said claim, had a conversation with the defendant touching the solvency of said estate, in which the defendant stated to the complainant that said estate would pay very little, and that the money then due on said note might be paid by Moore, the surviving partner of defendant's intestate. The complainant thereupon withdrew the note from the files, with a view to collect what he could of Moore, the surviving partner. The note was thus withdrawn on the 12th of December, 1868, and in the following month the defendant paid and discharged claims then on file, amounting to less than $300, which left a balance on his hands of $980. The complainant failed to collect any portion of said note from Moore, then a citizen of Alabama, and he re-filed the same on the 5th of November, 1869, and demanded payment, which was refused. The answer of the defendant admits the conversation with complainant touching the solvency of said estate, but the defendant says he does not remember the purport thereof, and there was no proof on this point. He denies, however, all intention to mislead or defraud the complainant. The Chancellor was of opinion that the withdrawal of the note from the file was an

abandonment of the claim as against the defendant's intestate, and decreed accordingly, dismissing the bill and taxing the complainant with the costs. Under the circumstances of the case we think the withdrawal of the claim for the purpose indicated was not an abandonment thereof, and being filed again before a final distribution of the funds, it should have been allowed. This Court has said that the insolvent laws are to be construed so as to advance the remedy intended by them. The evil to be suppressed was the power given by law to a vigilant and active creditor to appropriate all the effects of an insolvent estate to his own claim, to the exclusion of other creditors of equal merits, but of less rapacity or astuteness, and the remedy is to compel a *pro rata* distribution in such cases. 5 Hum., 62; 11 Hum., 261. In this case, whether involuntarily or otherwise, the complainant was misled by the representations of the defendant of the hopeless insolvency of the estate and without any express intention to abandon his claim against the estate, he seeks its satisfaction out of the surviving partner. In this course he was certainly doing the estate no disfavor, and as the estate turns out at last to be insolvent, and he re-files the claim before distribution, it should have been allowed.

Reverse the decree and remand the cause.

D. M. Perkins, Plaintiff in Error, *v.* Samuel Watson, Trustee.

# D. M. Perkins, Plaintiff in Error, *v.* Samuel Watson, Trustee.

1. Banking corporations. *Usurious interest. General laws applicable to, as individuals.* When a charter is silent as to any violation of the limitation imposed upon the bank in lending money, the general laws against taking unlawful interest are applicable, and the bank in such case can only be treated as a natural person would be for a similar infraction of law; its contracts are void only for the excess had above the legal interest and reasonable exchange.

Cases cited: 4 S. & M., 75; 8 *Ib.*, 151; 40 Me., 109; 13 Conn., 249; Dill *v.* Ellicott (Taney Circuit Court Decisions); U. S. *v.* Owens, 2 Peters, 527; Bank of Chillicothe *v.* Swayne, 8 Ohio, 252; Rock River Bank *v.* Sherwood, 10 Wisconsin, 230; Creed *v.* The Commercial Bank of Cincinnati, 11 Ohio, 489; Spaulding *v.* The Bank of Muskingum, 12 Ohio, 544; Orr *v.* Lacey, 2 Doug., 230; Commercial Bank of Manchester *v.* Nolan *et al.*, 7 How. Miss., 508; McLean, assignee, etc., of Manard, *v.* The Lafayette Bank *et al.*, 3 McLean, 587; Wetmore *v.* Brien & Bradley, 3 Head, 723.

Acts cited: 1741, ch. 11, clause 2d, 1838, 1855, Constitution of 1834.

2. Same. *Same. Contracts. Prohibition implied and expressed.* When contracts are prohibited by statute, the prohibition is sometimes expressed, and at others implied. Whenever the law imposes a penalty for making a contract it impliedly forbids the same, and when a contract is prohibited, either expressly or by implication, it is illegal and can not be enforced.

Cases cited: Bensley *v.* Bignold, B. & A. L. D., 335; Foster *v.* Taylor, 5 B. & A. L. D., 887; Cope *v.* Rowlands, 2 M. & W., 149.

3. Notes. *Accommodation endorser. Liability of.* Where a principal discounts a bill at a greater rate of discount than 6 per cent., this will not be such a fraud upon an accommodation endorser as to discharge him from all liability upon the bill.

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FROM LINCOLN.

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Appeal from the Circuit Court. Wm. P. Hickerson, Judge.

D. M. Perkins, Plaintiff in Error, *v.* Samuel Watson, Trustee.

J. W. NEWMAN, E. COOPER and J. A. WARDER for Perkins.

J. B. HEISKELL, Attorney General, for the State.

BURTON, Special J., delivered the opinion of the Court.

On the 18th of April, 1861, Kelso & McDonald drew a bill of exchange (acceptance waived) on Beadley, Wilson & Co., of New Orleans, for ten thousand dollars, indorsed by the plaintiff in error, and one Cornelius Allen. The bill was discounted by the Bank of Tennessee, at Nashville; it was drawn at nine months, and being unpaid at maturity, it was regularly protested. In 1867 suit was commenced upon the bill against McDonald and the two endorsers by Samuel Watson, the assignee in trust of the bank. In the progress of the cause McDonald was discharged on a plea of bankruptcy, and the cause proceeded against the other two defendants. At the November term, 1871, the cause was tried by a jury of Lincoln County, before the Hon. William P. Hickerson, Judge of the Circuit Court. The trial resulted in a verdict of $14,240.47 against the defendants. A motion for a new trial was entered and continued over until the next term, when the motion was overruled, and D. M. Perkins (one of the defendants) appealed to this Court. The jury found the special fact that the bank took one hundred and thirty dollars of usury when they discounted the bill. This amount was deducted from the face of the bill,

and the verdict was for the balance and the interest thereon.

The errors assigned will be seen by the following extracts from the instructions given to the jury by his Honor, the Circuit Judge: "It is next insisted that the bank received more by way of interest or exchange than it was allowed by its charter to collect upon the discount of this bill, and therefore the contract was not only void as to the excess received by way of interest or exchange, but is void as to the whole bill. . . If the proof satisfies you that the bank, in discounting this bill, discounted therefrom more than six per cent. interest for the time the bill had to run, or more than a reasonable rate by way of exchange between Nashville and New Orleans, then the transaction would be usurious to the extent of the excess had by way of interest or exchange over and above six per cent. and reasonable exchange." The Court also instructed the jury that the Act of 1859–60, prohibiting banks in a state of suspension from charging more than one per cent. for exchange, applied to the Bank of Tennessee, if in point of fact that institution was in a state of suspension when the bill in suit was discounted. Upon this point then there was no error committed against the appellant, and indeed that is not the point relied upon.

It will be perceived that his Honor was of opinion that the general usury laws applicable to indi-

viduals or natural persons were also applicable to the corporation or artificial person—the Bank of Tennessee; and therefore the contract by which this bill was discounted is only void as to the excess over and above six per cent., applying the same rule of construction to this contract as though it had been made between natural persons. On the other hand, it is insisted by the appellant that the bank, having discounted the bill at a greater rate of discount than is allowed by its charter, the contract is void, not because it violated the usury laws, but because it is such a contract as the bank had no power or capacity to make. The bank; it is said, is the mere creature of its charter, and derives all its powers and capacities from the law of its creation, and if it exceed the rate of interest allowed by its charter, the contract is *ultra vires* and void *in toto.*

We proceed then to inquire whether or not his Honor was correct in assuming that the general usury laws of the State apply to contracts made by the Bank of Tennessee.

Ever since the Act of 1819 the statutory law has been that when money is loaned at more than six per cent., the party could recover the principal and simple interest, and the excess over six per cent. alone was usury. This was a radical change of the North Carolina Act of 1741, chapter 11, clause 2d, before that time in force, by which contracts whereby more than six pounds in the hundred were taken for the use of money loaned per annum was declared to

be utterly void. Notwithstanding the Act of 1819, the Legislature had granted to banks and to other moneyed corporations the privilege of taking more than six per cent. for the use of money, and these special charters, or rather this privilege granted to them, gave rise to § 6, Article XI. of the Constitution of 1834, whereby it is provided that "the Legislature shall fix the rate of interest, and the rate so established shall be equal and uniform throughout the State." That the object of this provision was to inhibit the Legislature from granting to banking corporations the privilege of taking a greater rate of interest than was allowed to individuals, is manifest from the journals of the Convention. The Journal of the Convention of 1834, p. 161–162. Some four years after the Constitution of 1834 went into effect, the Legislature passed the Act establishing the "Bank of Tennessee," on the 19th day of January, 1838. This Act is very lengthy, and was prepared with great apparent care and deliberation, but it is not thought necessary for the purpose of this discussion to notice particularly more than two of its provisions.

Section 9 is as follows: "Be it enacted, that the following powers, rules, conditions, limitations and restrictions shall be fundamental laws of said bank, viz." Following this general provision are various "*Articles*," thirteen in number, providing for the election and compensation of officers, and making various minute provisions as to how they should conduct the

banking business proper. So much of Article 4 as is relevant is embraced in these words: "They shall . . . deal in bills of exchange . . . and discount notes at said bank, with two or more good indorsers thereon, at a rate of interest not exceeding *six per cent. per annum; provided,* that this article shall not be construed so as to prevent said bank from demanding and receiving a reasonable premium for exchange in addition to the interest upon bills or notes payable at a point beyond the limits of this State."

Here it is perceived that no exclusive privilege or franchise is granted to the bank, so far as the power to discount notes is concerned. But they are put upon precisely the same footing in this respect that natural persons are by the general statutory law, neither being allowed to take more than six per cent. per annum for the loan of money. It is to be further observed that the bank charter nowhere declares what shall be the consequences of a violation of the charter by taking more than the allowed per cent. No penalty or forfeiture is prescribed by the charter, and this we think is significant, in view of the fact that other violations of 'the rules declared to be fundamental by this charter are visited by the severest penalties. For instance, Article 5, under § 9, prescribes that the total amount of debts which the bank shall owe at any given time shall not exceed twice the amount of the capital stock paid in over and above the moneys actually on deposit for safe-keeping.

And by the following section, in case of a violation of this Article the Directors, under whose administration it happens, are made individually liable therefor to the creditors of the bank.

Now, when we see that the Legislature has so carefully guarded against this violation of the charter, it is fairly to be inferred that had they intended that a violation of the charter by lending money should be visited by the penalty of the forfeiture of the whole sum to the borrower, that intention would have been expressed in the most unequivocal terms. In case, then, the banking law is violated, and the charter affixes no penalty for such violation, we can only look to the general statutory law to ascertain the consequences of such violation, and both upon reason and authority the act of the bank in taking excessive interest can only be viewed and treated as the act of a natural person would be for a similar infraction of law. 4 Smedes & Marshall, 75; 8 *Ib.*, 151; 40 Me., 109; 13 Conn., 249.

We have thus far considered this case as though it were that of a corporation towards which the State of Tennessee stood indifferent. But when it is remembered that in this institution the State is the sole stockholder, the improbability that the Legislature intended the consequence insisted upon by the appellant is greatly enhanced. Upon the foregoing reasoning and authority we would be content to rest our conclusions that his Honor, the Circuit Judge, was right in applying the general usury laws to this transaction. Several authorities, however, have been earnestly pressed upon

us, and we will proceed to notice them or such of them as are most insisted upon.

*Dill* v. *Ellicott* (Taney's Circuit Court decisions), decided by Chief Justice Taney, is relied upon by appellants, and is as follows: To an action brought by the endorsee against the acceptors of a bill of exchange the defendants pleaded that the bill was given to secure the payment of money loaned by the plaintiffs to the payee of the bill, upon which an interest exceeding six per cent. was reserved, and that such contract was usurious, and the plaintiff not entitled to maintain an action upon it. To this plea the plaintiff demurred, and the question made by the pleading was whether an action could be maintained under the Constitution of Maryland, adopted in 1851, when an interest of more than six per cent. was reserved or received.

The section of the Constitution was in the following words: That the rate of interest in this State shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded; and the Legislature shall provide by law all necessary forfeitures and penalties against usury."

Before and at the time this Constitution was adopted an Act of Assembly was in force, by which the lender was entitled to recover the amount actually loaned with six per cent. interest upon it, although the contract was usurious. The points decided by the Chief Justice were:

1. That the provisions of this Act were inconsistent

with the clause of the Constitution before recited, and therefore repealed by it.

2. That a contract in violation of the Constitutional provision was void for the whole amount, although the Legislature had not at the time provided for penalties and forfeitures against usury, as they are thereby required to do.

We have carefully considered this case, and are unable to see its application to the case in hand. The parties were natural persons and therefore it has no relevancy to a discussion of corporate powers, and if, as the Court assumed the act allowing the recovery of all except the excess over legal interest on a usurious contract was repealed when the case arose, it has no possible bearing on the other point under discussion.

In the course of the argument two other cases have been pressed upon us, to-wit: *The Bank of the United States* v. *Owens*, 2 Peters, 527; *Bank of Chillicothe* v. *Swayne*, 8 Ohio, 252. In the case of the *Rock River Bank* v. *Sherwood*, 10 Wisconsin, 230, these authorities are ably reviewed, and the reasoning of the opinion upon the point now in judgment is so satisfactory that we will be excused for quoting from it at large. After stating the admitted doctrine that the contract of a corporation forbidden by its charter, or entirely foreign to the purpose and objects of its creation, or beyond the scope of the authority granted in its charter, is void, and illustrating it by numerous examples, the opinion proceeds as follows: Does the present case fall within

that class of decisions? Here the bank, it is concluded, had full and ample power to discount promissory notes, loan money, etc., and conduct a general banking business, but it could only reserve ten per cent. interest upon its loans. It is not a case where a corporation usurps a power not given by its charter, but when in the exercise of a lawful power and in conducting its legitimate business it has exceeded the limits fixed by law. Had the note been given drawing ten per cent. interest after it became due, there could have been no question as to the validity of the contract. But the objection is, that the bank had no authority to discount a note at a greater rate of interest than the general banking law allowed; and if it does, the note is void for want of such power. Is this objection sound? I think not. And yet it must be admitted that there are a number of cases which appear to sustain this position. *The Bank of the United States* v. *Owens*, 2 Peters, 527; *Bank of Chillicothe* v. *Swayne*, 8 Ohio, 252; *Creed* v. *The Commercial Bank of Cincinnati*, 11 *Ib.*, 489; *Spaulding* v. *The Bank of Muskingum*, 12 *Ib.*, 544; *Orr* v. *Lacey*, 2 Doug., 230, are cases where this question as to the effect of a bank discounting a note at a greater rate of interest than is allowed by its charter is discussed, and some of them hold distinctly that the contract is void, for want of capacity in the bank to make it.

I am not prepared to follow these decisions. In my judgment the reasoning of these cases is clearly, successfully and completely answered by the opinions

given in the *Commercial Bank of Manchester* v. *Nolan* et al., 7 How. Miss., 508, and *McLean, Assignee, etc., of Manard,* v. *The Lafayette Bank* et al., 3 McLean, 587. Mr. Justice Clayton gave an exceedingly able and elaborate opinion in the first case, in which the case in 2 Pet. is carefully examined and reviewed, while the doctrine of the Ohio cases is vigorously assailed, and to my mind completely overthrown. In the case in the 3d McLean, Mr. Justice McLean, in considering the effect upon the contract of a bank taking usury, and meeting the objection that such a contract was void for want of power of the bank to make it, uses the following language (p. 611): "Now here is a capacity imparted to do every thing which a natural person could do in relation to the business specified. The natural persons who compose the corporation are authorized to do, in their aggregate capacity, what each one might do in his natural capacity. Now, what is the difference between the natural and artificial capacities here spoken of? It is admitted that an artificial person has no power to violate the law of its creation, or any other law. Has a natural person power to violate the law? We suppose not, and in this respect no differenee is perceived between the two capacities. It is not a question of capacity, but of prohibition. A natural person is prohibited from taking more than six per centum per annum interest. If it were not for the prohibition he might agree for any reasonable rate of interest. And if

the bank had not been prohibited in like manner, might it not have charged in the same way? Is there any doubt of this? It has power to loan money on interest, and no rate of interest being established by law, may it not contract for the rate of interest as a natural person? If it may not do this, it may do nothing. The prohibition in the charter acts upon the artificial capacity as the general law of the same import acts upon the natural capacity of every citizen."

Again he says, while endeavoring to show that a bank and an individual occupy the same ground as to taking usury: "Neither can have any implied power to make a contract in violation of law; and the argument that a bank can do nothing for the doing of which power is not given, while an individual may do any thing which is not prohibited, is without force, because it can have no application to the case. The act is prohibited alike to the bank and the individual. On what principle, then, can the distinction be sustained? As has been shown, the bank has the same power, under its charter, to make a contract for the loan of money as an individual, and if more than six per centum per annum had not been prohibited, it might have charged more."

In the foregoing opinion reference is made to the able opinion of Mr. Justice Clayton in the case of *The Commercial Bank of Manchester* v. *Nolan*, reviewing both of the cases so much relied upon by the learned counsel of the appellants in this case. We regret

that we are unable to present in its force and fullness the argument of Justice Clayton in support of our views. Part of his reasoning, however, is so applicable to the facts of this case that we can not forbear a quotation: "An Act of incorporation never attempts to embody all the rules and principles which are to govern the institution it creates; of necessity it has reference to the existing laws of the State in which it is passed. Those laws apply as forcibly to an artificial person at the time of its creation as to a natural person at birth. The one is governed by them except so far as exempted by its charter, just as the latter is clothed with them at the first moment of existence. A charter containing provisions contrary to the Constitution would be void, precisely as any other legislative act. This shows that the general laws in force at the time of its creation bear upon it, except so far as its charter may take it out of their influence. . . . Indeed, the argument for the defendant in error (plaintiff in error in this case) is founded upon the assumption that this corporation is subject to the general law of the land, for it demands the application of a common law principle to this contract to make it void. The common law can only be in force in this State to the extent that it remains unchanged by statute. The common law rule against usury at the time of the enactment of this bank charter was so far modified that the contract was only avoided as to (the excess of) the interest."

But our purpose is mainly to show by the aid of Mr. Justice Clayton's opinions that the opinion of the Supreme Court in the case of *The Bank of the United States* v. *Owens*, 2 Peters, 527, is clearly distinguishable upon the vital point in the case in hand. It is true, as argued by the appellant's counsel here, that a law did exist in the State of Kentucky where the contract in that case arose similar to ours, in that it avoided a usurious contract only as to excess over the legal rate of interest, but it is certain that the Supreme Court did not rest its judgment at all upon the statute. For the Court expressly say the question here has relation exclusively to the legal effect of a violation of the provision in the charter on the subject of interest, and does not bring in question the operation of the Statute of Usury of Kentucky upon the validity of this contract.

It is true the learned Judge says that it does not appear why the case was decided without reference to the statutes of Kentucky; but his conclusion, which seems satisfactory, is that the Court had frequently decided that the Bank of the United States was governed by the law of Congress alone, and was subject to no other legislation, and as there was no Act of Congress which permitted a recovery of the principal sum but where there had been usury, the case was left to the general common law doctrine; his conclusion was that had there been such an Act of Congress, the decision in that case would have been different, else, as he forcibly asks, why do they so carefully

say that they can not consider of the effect of the statute of Kentucky?

The remaining case principally relied upon is *Wetmore* v. *Brien & Bradley*, 3 Head, 723. In reference to this case, we observe that it was decided under a contract made with one of the banks, organized under what is known as the "Free Banking Law" of 1851–2. The prohibition against usury in that law, and the amendment of 1856, is made under severe penalties. Persons exercising the privilege of banking under said Act, "shall not be authorized to discount or shave notes, directly or indirectly, at a greater discount than the other banks are allowed, under existing laws; and a violation of this section shall forfeit all rights of banking under this Act;" and the persons so offending are also "declared guilty of a misdemeanor, and on conviction, shall be fined in a sum not less than fifty, nor more than five hundred dollars for each and every offence."

When contracts are prohibited by statute, the prohibition is sometimes expressed, and at others implied. Wherever the law imposes a penalty for making a contract, it impliedly forbids parties from making such a contract, and when a contract is prohibited, whether expressly or by implication, it is illegal, and can not be enforced. Of this there is no doubt. *Bensley* v. *Bignold*, 5 B. & A. L. D., 335; *Foster* v. *Taylor*, Ibid., 887; *Cope* v. *Rowlands*, 2 M. & W., 149.

This principle was applied in the case of *Wetmore*

v. *Brien & Bradley*, and as we understand the case, it was by reason of the existence of this penalty that the Court concluded that the violation of the Act of 1845-6 was not to be construed in *pari materia* with the general usury laws. Much stress was also laid upon the fact that the "Free Banks" had notoriously departed from the legitimate business of banking allowed them by their charters, and were converted into establishments for oppressing the community by usury and extortion. It is obvious that this decision is not in conflict with the conclusion at which we have arrived—that when the bank charter is silent as to the consequences of violating the limitations imposed on it in the lending of money—we must apply to it the general law against taking unlawful interest on money.

We do not assent to the argument of counsel, that if Perkins was an accommodation indorser, the discount by his principals of the bill at a greater rate of discount than six per cent., would be such a fraud upon him as would discharge him from all liability upon the bill. We further think that the question of payment was fairly submitted to the jury, under proper instructions, and after a most careful consideration of the case, we find no error in the record, and the judgment is affirmed.

R. E. Lane *v.* F. W. Keith.

# R. E. Lane *v.* F. W. Keith.

1. Sheriff. *Motion against. Notice.* Where a motion is made against a sheriff for failing to return an execution sent to him from another county, he is only entitled to notice, when he is sought to be made liable on the certificate of the Clerk, that he *mailed* the process to the Sheriff. Therefore, where the process is *delivered* to the Sheriff, he will not be entitled to such notice.

   Code construed, §§ 3585–7, 3598–9; see also 1 Baxter, Reese *v.* Creson, 458.

2. Same. *Same. Facts recited in judgment.* Where, upon the face of the judgment, it appears, by the *certificate of the Clerk*, that the execution was mailed, then the fact of notice must be shown, or the judgment will be void for want of jurisdiction.

3. Same. *Practice. Surety, may recover. When.* A surety on an official bond, who has paid money for his principal as such, may recover the same in an action for money paid to his use.

4. Judge's Charge. *Presumption as to.* If the bill of exceptions fails to set out the Judge's charge, but states "that among other things unexcepted to, he charged the jury as follows," the Supreme Court is bound to presume he charged the law correctly.

FROM LINCOLN.

Appeal from the Circuit Court. W. P. Hickerson, Judge.

No brief appears for Lane.

Lamb & Tillman for Keith.

Freeman, J., delivered the opinion of the Court.

Plaintiff sued defendant for money paid to use of defendant.

The facts are that Keith was elected Sheriff of

R. E. Lane *v.* F. W. Keith.

Lincoln County, at the March Term, 1868, but did not give bond until the 3d day of June, 1868, when complainant became one of his sureties. In July, 1868, a judgment was rendered in favor of Charles L. Reese, against one Gregory, for about $2,000, in the Circuit Court of Franklin County, on which an execution was issued the 29th of July, 1868, and sent to the Sheriff, and by him received. At the November Term, 1868, a motion was made against Keith and sureties on his official bond, for failure to return this execution, it being the return term of the same, and judgment rendered. On this judgment an execution was issued, and sent to the Coroner of Lincoln County, who levied the same on plaintiff's property, and sold it to satisfy the same. Thereupon this suit is brought to recover the money so paid by the security.

It is first insisted that the judgment is void on its face, and, therefore, the execution a nullity, under which the property was sold and the payment made, and that as a consequence the plaintiff can not recover.

Was the judgment void, because it does not show on its face that the Sheriff had notice of the motion, he residing in another county than the one from which the execution was issued? If the law required notice to be given him, and he did not waive it by appearance, it would certainly, under our decisions, be void as to the party entitled to the notice. There was no appearance in the case. Section 3585

of the Code, Art. 1 of chapter on summary proceedings, provides that "no notice of motion is required, if made at the return term of the process in a Court of Record, where the cause of motion is official delinquency, or within six months after the right to the motion has accrued in any other." This is plain and clear. In the next article of the same chapter, however, it is provided in substance, by Section 3598, that on trial of the motion, a copy of the execution, certified by the Clerk, with the return, or a statement of the want of a return, and certificate that the execution was received by the Sheriff, or sent by mail, is evidence of the facts certified, and the next section provides "so also the certificate as aforesaid;" that the execution was sent to the officer by mail, will be *prima facie* evidence that the writ was received by the officer, unless he states under oath in writing that he never received the writ. In such case, the officer shall have notice of the motion.

It can not fairly be conceived that the Legislature intended to require the notice to be given, after the officer had appeared and denied under oath in writing the receipt of the writ. We therefore conclude that the true construction to be given to these sections, when taken together is, that in all cases where the receipt of the writ is to be shown by the certificate of the Clerk, as provided for, then the notice must be given, in order to enable the Sheriff to meet the *prima facie* case, by the denial authorized by the statute. If the case is to be made out by other

evidence, such as the receipt of the Sheriff or his deputy, then no notice is required, but only proof in the usual way of the execution of the receipt. Such seems to be the true meaning of the Code on this subject.

Testing the judgment in this record by this rule, we find nothing on its face to show that they were shown to have been sent by mail, by the certificate of the Clerk. On the contrary, the judgment shows on its face that "said execution was delivered to said Sheriff on the 20th day of October, 1868, and that he had failed to return it." We can not infer that it was sent by mail. If it had been shown in the face of the judgment, that it appeared by certificate of the Clerk, that it had been sent to him by mail, then the fact of notice of the motion for length of time, as required by Section 3587 of the Code, would have to be shown also, or the judgment must be void for want of jurisdiction in the Court to render it. No such fact appearing, the judgment is not void, but is valid on its face, and the argument of counsel for plaintiff fails on this question.

The simple question then presented is, as to whether a surety who has paid a liability by judgment growing out of his bond as surety of an officer, can recover the money back from his principal, in an action for money paid out to his use. On this question we think there can be no doubt, and the judgment of the Circuit Court is correct, so far as this judgment is concerned. There is another case

handed in with the above case, and heard with it, involving the same question, which must be affirmed likewise.

It is proper to remark that we find a copy of a judgment in favor of B. and H. Douglass, with executions issued on the same in one, or, perhaps, both cases. It is insisted that the judgments are void on their face, because they show the executions were issued and delivered to the Sheriff in April, when he only gave his bond as Sheriff in June, 1868. Objection was made to the admissibility of the record of both judgments, the one in favor of Reese, as well as the Douglass judgment. We find, however, his Honor charged the jury only as to the Reese judgment in the record, it being stated that, among other things unexcepted to, he charged the jury as follows. We are bound to presume that he charged the law correctly, as to this judgment, especially, as no request is found to charge on the subject in the record. We can not presume that he erred, when it does not appear what he did.

The case must be affirmed.

Nancy R. Perkins *v.* M. T. Cheairs *et al.*

## NANCY R. PERKINS *v.* M. T. CHEAIRS *et al.*

1. RESULTING TRUST. *Does not exist. When.* Where the husband, for a nominal sum, purchases the reversionary interests in his wife's property from her brothers, promising to settle the same on her in fee, as part consideration, but dies without executing such agreement, the land descends to his heirs, without resulting trust to his widow.
2. STATUTE OF FRAUDS. A promise to convey lands, in future, though made at the time of taking a conveyance, is within the Statute of Frauds, and void.

Cases cited: Brown on Fraud, §§ 84, 85, 86; Am. Notes, 9694; Bullard on Trusts, 31; 2 Johnson's C. R., 408; 7 Ind., 310; 1 L. C. Eq., 178; 13 Ill., 335-6; 2 Am. R., 310; 51 Ill., 458.

FROM MAURY.

Appeal from the Chancery Court. HILLARY WARD, Special Chancellor.

W. C. WHITTHORNE, D. CAMPBELL and JAS. D. PARK for Nancy R. Perkins.

BROWN & MCCOLLUM, DEMOSS & MALONE, EWING, HOUSE & TURLEY, and J. W. WHITTHORNE, JR., for Cheairs *et al.*

DEADERICK, J., delivered the opinion of the Court.

In 1845 Nathaniel Cheairs made his will, and shortly thereafter died. Testator devised to his daughter, the complainant, then the wife of Constantine Perkins, a tract of land in Maury County, containing about 400 acres, during her life, and then to her heirs; but if she should die without heirs of her

body, then the land was to be vested in his four sons, Martin T., John W., Thomas D. and N. F. Cheairs, share and share alike, and their heirs for ever. Complainant was married to the said Constantine Perkins in 1832, being then about twenty years of age, and has never had a child. Her husband died intestate in 1864. Perkins and wife took possession of the land and moved to the place about the year 1847. On the 15th of July, 1850, Constantine Perkins obtained a deed of conveyance from Nathaniel F., Martin T. and John W. Cheairs, three of the four brothers of complainant, of their reversionary interest in the said tract of land. This deed upon its face conveys to said Constantine Perkins "the reversion of a certain tract or parcel of land," (describing it), in consideration of the sum of $1,000 paid to Martin F. Cheairs, $1,000 paid to John W. Cheairs, and $1,000 paid to Nathaniel F. Cheairs, by the said Constantine Perkins, the receipt whereof was acknowledged in the deed. The deed also contains the usual covenants of warranty of title, and recites that complainant has a life estate in the same, under the will of her father. This deed was acknowledged before the Clerk of the County Court of Maury County, by the makers, the 1st of November, 1858. In 1867 complainant filed her bill, alleging that her late husband was unwilling to repair and improve said land, unless he could secure to himself and complainant the whole estate in said land, as she had but a life estate, without prospect of a child, and in

the event of her death, the title to the land would vest in her brothers.

In view of these facts, it is alleged in the bill, "that said Constantine Perkins approached the four brothers and proposed to each of them to purchase their several and respective interests in and to said tract of land, so devised to complainant and them, stating and agreeing that if they, the said John W., Martin T., Thomas D. and N. F. Cheairs would, for a nominal sum, convey to him their respective interests in said tract of land, he, the said Constantine Perkins, would give and settle the entire estate upon their sister, the wife of said Constantine Perkins, so as to invest her with an estate in fee to said tract of land." The bill further alleges that the conveyance was made by three of her brothers, for a nominal consideration, expressed in the deed, of $1,000 paid to each, and upon the further consideration and trust that the said Constantine Perkins would, as he proposed and agreed to do, settle the entire estate upon complainant. Thomas D. refused to convey his interest, and the bill alleges that the registration of the deed was delayed in the hope and expectation that he would convey, and this is stated as one of the reasons why the completion of the settlement of the land upon her by her husband was delayed.

It is alleged that the interests of her brothers in the land were worth greatly more than $1,000 each, and that the conveyance to her husband was made

to him in "trust that he would make the settlement upon her as proposed, which she prays the Court to declare and enforce." The bill then states that the said Constantine Perkins died in 1864, in the midst of the war, and that "he failed, by any assurance of title whatever, to make said settlement, or discharge said trust," although he repeatedly stated to his confidential friends that he had made a will, and amply provided for complainant.

Complainant further states that she can not doubt, from the evidence before her, that her husband had made provision for her, settling by will upon her the said tract of land. The heirs at law of her husband, and the three brothers who conveyed to him, are made defendants to the bill. The heirs of Perkins answer, and deny that the land was bought by said Constantine, charged with any trust, in favor of complainant, or that any such trust as alleged can be enforced, and claiming, as heirs at law of said Constantine, his interest in the land.

The Chancellor decreed the complainant the relief prayed for, and the heirs at law of Perkins have appealed to this Court.

Nathaniel T. states in his examination as a witness that he agreed, as did his brothers, to sell to Perkins, upon condition that he would settle the land upon complainant, "by deed, in fee simple, with right of disposal as she pleased, reserving his right to live on it." That his object, and that of his brothers, was to secure the place to his sister, Nancy

R,, and a home for Mr. Perkins; and that it was with the express understanding with Mr. Perkins that the settlement of the same upon his wife should be made, that either of us ever consented to sell our interest. And witness further stated that he had often heard Mr. Perkins say that the reason why he had delayed making the settlement was, that he hoped to induce Thomas D. to part with his interest, and then he could settle all of the tract of land upon his wife by one conveyance.

M. T. and John W. Cheairs make substantially the same statements as to the conveyance to Perkins.

J. T. Fleming states, that in December, 1862, he traveled from Arkansas to Maury County, Tennessee, with Constantine Perkins, and that he told him he had bought of the Cheairs' "a life-time interest in the place," upon condition that it was to be his wife's at his death; that he gave $1,000 for each share. He said he always kept his will, and he had given all his property by his will to his wife.

Other witnesses detail statements made by Perkins in his life-time, showing that he claimed a life estate in the land, and recognizing and calling it his wife's land. It may, therefore, be assumed that the statements in the bill, as to the agreement of Perkins to settle the land upon his wife, are clearly and satisfactorily established by the evidence.

For complainant it is insisted that this transaction created a resulting trust in her favor; that the surrender or gift by the brothers of the assumed and

unascertained difference between the $1,000 paid to each for his contingent remainder, and its actual value, was a payment by her towards the land, and was so intended, and that Perkins also intended to make a gift to his wife of the difference between the value of the life estate to be acquired by him and the fee.

Lord Hardwicke divided resulting trusts into three classes: 1. Where an estate is purchased in the name of one person, but the money or consideration is paid by another. 2. When a trust is declared only as to part, and nothing said as to the rest, what remains undisposed of results to the heir at law. 3. When transactions have been carried on *mala fide*.

Brown on Frauds, § 84, says: To constitute a resulting trust of the first class in real estate, it is necessary that the consideration money upon the purchase should have belonged to the *cestui que trust*, or that it should have been advanced by some other person as a loan or gift to him, or for his benefit. Tiffany and Bullard on Trusts, 31; 2 Johns. C. R., 408. However, it is held that if the party who sets up a resulting trust has made no payment, he can not be permitted to show by parol proof that the purchase was made for his benefit, or on his account. See also 7 Ind. R., 310. It is because of the payment of money or other valuable thing, that a trust results, and where part only of the purchase money has been paid by the *cestui que trust*, the trust results *pro tanto*, or for a part of the estate, propor-

tionate to such part of the purchase money advanced. But though there may be a trust of a part only of the estate purchased, it must be of an aliquot part of the whole interest in the property. The whole consideration for the whole estate, or for the moiety, or the third, or some other definite part of the whole, must be paid. Brown on Frauds, § 85-6; Am. Notes, L. C. Eq., 178.

These resulting trusts do not arise or depend upon any agreement of the parties, but are mere implications of law, from the fact of the purchase with another's money, or the fact of declaration of trust as to part of the estate only, and silence as to the remainder; or the fact of fraud in procuring the legal title. They arise upon the actual conveyance of land, and not upon an executory contract, to hold land in trust. Even where the contract or agreement to hold the land in trust is the means of obtaining the legal title, the trust is not created by the contract, but results, or is implied from the fraud. Brown on Frauds, § 184.

The deed to Constantine Perkins recites upon its face a consideration of $3,000, paid by him, and no other. The proof shows that he paid this sum, or bound himself to pay it, and no other consideration appears from the deed. But it is shown in the evidence that Perkins promised the vendors that if they would convey to him he would, at some future time thereafter, settle the property on his wife, and that upon this promise of Perkins, and the money consid-

eration, they executed a deed in fee simple to Perkins.

At the time of this conveyance the Cheairs brothers, under the will of their father, were to take the remainder in fee of the land, if their sister, who had the life estate, died without issue of her body. Perkins, under the parol contract, could take only a life estate, after the termination of his wife's estate for life, if she left no issue of her body. If she had issue, the interest of the brothers would be defeated, and of course Perkins would get nothing.

Can it be said that complainant paid any definite part of the consideration of the land to her brothers, or that they advanced for her any definite sum or proportion of the price of the land? True, they say he, Perkins, agreed, or promised that he would convey or settle the land upon her, retaining a life estate; but aside from the uncertainty of the interest of the vendors, and its indefinite value, the resulting trust does not arise upon the contract by parol of the parties, in the absence of fraud, but alone upon the payment by the *cestui que trust* of the purchase money, or some aliquot or definite part of it, and in cases unaffected by fraud, the parol testimony is admitted not to show an agreement to purchase for another, or that he promised to convey an interest in the land purchased to another, but to show that the purchase money was paid by the party claiming, notwithstanding the deed was taken in the name of another person. Brown on Frauds, § 96.

The parol testimony shows, not that it was intended that Perkins should hold the land as trustee under the conveyance to him, but that he promised that he would convey to his wife by a separate deed, at some future time after the date of the deed made to him. Such a promise is within the statute of frauds, and can not be enforced.

It is likewise insisted in the argument that the brothers consented to convey to Perkins only in consideration of his promise to settle the property on his wife, and that his failure to do so was a fraud upon her rights, and that he or his heirs will be treated in equity as holding the legal title in trust for her.

The fraud which suffices to lay a foundation for such a trust is not simply that fraud which is involved in every deliberate breach of contract. But there must have been an original misrepresentation, by means of which the legal title was obtained, and an intention to circumvent, by means of the confidence imposed. Brown on Frauds, § 94; 13 Ill., 235-6; 2 Am. Rep., 310; 51 Ill., 458. And the fraud should be distinctly charged in the bill, and clearly proved. Brown on Frauds, § 96. In this case there is no allegation of fraud, nor is there any proof of it.

The result is, that we are of opinion that the complainant is not entitled to the relief prayed for, and we reverse the decree of the Chancellor, and dismiss the bill with costs.

J. W. Johnson and Wife *v.* R. P. Roland *et al.*

# J. W. Johnson and Wife *v.* R. P. Roland *et al.*, and John H. McDowell *v.* J. W. Johnson and Wife.

1. Duress. *What will constitute.* The threat must be of such a character as to overcome the mind and will and destroy the free agency of a person of ordinary firmness.
2. Evidence. *Deposition. Competency of.* The deposition of a witness is admissible in evidence, though taken while the witness was incompetent, provided the witness be competent when his evidence is offered on the hearing of the cause.
3. Trustee. *Evidence of acceptance. Effect of non-acceptance on the legal title.* The deed was acknowledged by the bargainor, and properly registered; this would not vest the legal title in the trustee without his acceptance, the *delivery* of a deed of assignment being essential. While the dissent of a trustee to accept the trust may re-vest the legal title in the grantor, yet the beneficiaries may have the trust executed for their benefit by a Court of Chancery.

   Cases cited: Watts *v.* Targ t, 6 Penn., 320; Brevard *v.* Neely, 2 Sneed, 164.
4. Same. *Levy on land held by trust deed.* Where a valid trust deed exists, no title to property so held can be acquired under subsequent levy.

   Cases cited: Hannum *v.* Wallace, 4 Hum., 143.

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FROM WARREN.

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Appeal from the Chancery Court. John P. Steele, Chancellor.

Savage & Spurlock for Johnson and wife.

Thompson & Son for R. P. Roland *et al.*

W. E. B. Jones for McDowell.

J. W. Johnson and Wife *v.* R. P. Roland *et al.*

BURTON, Special J., delivered the opinion of the Court.

The counsel who opened this cause remarked correctly that there were three causes in the transcript of the Record, but they were consolidated and heard together as one cause.

We will proceed to consider them in the order in which they were presented.

1. The first bill was filed in the Chancery Court at McMinnville, on the 6th day of September, 1866, by J. W. Johnson and wife (Mary S.), against R. Roland, M. Hatterman, and Michael Blackburn.

The complainant (Mary S. Johnson) was the widow, sole legatee and executrix of Dr. H. B. Stubblefield, and she and her husband sue in their representative capacity.

The bill charges, in substance, that in the year 1861, complainant (Mary S.), as executrix, obtained a judgment before G. S. Purvis, a Justice of Warren, against the defendants for the sum of $255.80 and costs. Exeeution issued on this judgment, and was levied on the tract of land in suit of sixty acres, as the property of Roland, he being the principal debtor, and Hatterman and Blackburn being his sureties. The land was condemned to be sold for the satisfaction of this judgment by the Circuit Court of Warren, at its October term, 1865.

It further appears from the bill and evidence that on the 15th of July, 1862, Hatterman paid on the Justice's judgment $250, and took Mrs. Stubblefield's

receipt for the same, though it was not credited on the judgment. This payment was made in Confederate money, and was probably furnished by Roland, who was in the Confederate army, to Hatterman for that purpose. In the proceedings for condemnation no notice is taken of this credit, but the land was ordered to be sold to satisfy the whole debt and interest. A few days after this condemnation was had Roland went forward and paid to one Norwood, a Deputy Clerk of the Circuit Court, $29.85, the amount due on the judgment, after deducting the $250 paid in Confederate money, on the 15th of July, 1862; and this balance was paid, it seems, to one Pennybaker, the collecting officer of Mrs. Stubblefield. The bill alleges that this payment of $250 was made and the money received by complainant "under duress," and "from threats and intimations of violence to herself and property" on the part of Roland. Roland and Hatterman answer that he paid the $250 and took complainant's receipt for the same; he denies in the most positive and specific manner that he used any threats or fraud or other illegitimate means to induce the complainant to receive the Confederate money. The answer is not sworn to, the bill expressly waiving it.

The prayer of the complainants' bill is that the payment made under the facts aforesaid be declared void, and the payment of the $250 be declared void and held for naught. We have examined the evidence in this case, and our conclusion from it is

that there was nothing done by Hatterman to render the receiving of this money by the complainant void by reason of its being received under duress.

The doctrine of duress *per minas* has been so frequently discussed by this Court that no re-statement of it is called for here. It is sufficient to say that the threat must be of such a character as to overcome the mind and will and destroy the free agency of a person of ordinary firmness.

But one witness was examined by the complainants on this subject. The substance of his testimony is, that when Hatterman offered the money to Mrs. Stubblefield, she refused to take it. Hatterman replied that it was all the money that Roland could get, he being in the army. He stated that the Confederate authorities had made it a legal tender; he inquired the way to Brewster's; said that General Forrest was there, and that he would go and see him. Hatterman got up to start, when the complainant agreed to receive the money. After Hatterman left, complainant told witness that she had no use for the money, but that she preferred taking it to having any trouble about it.

The testimony of Hatterman is also taken in the cause. It was objected to, because he was a party defendant. The objection was sustained, and appeal taken to the Chancellor. How he disposed of the question, or whether he acted upon it at all, the Record nowhere discloses. But however this may be, this cause and the other with which it was consoli-

dated were not heard until May, 1870, at which time the Act of Assembly was in force providing that no person shall be incompetent to testify in a suit because he or she is a party to the same or has an interest in the subject matter thereof.

In construing this enactment, the Court has repeatedly held that the deposition of a witness is admissible in evidence, though taken while the witness was incompetent, provided the witness was competent when his evidence is offered on the hearing of the cause. When we look to this deposition of Hatterman, he denies that he used any threat or misrepresention, or other unfair means to induce Mrs. Stubblefield to receive the Confederate money just as emphatically and particularly as we have seen he did in his answer to the bill; he again insists that she voluntarily received the money. We also think that Hatterman's evidence derives some support from the facts stated by Pennybaker, that Mrs. Stubblefield wrote to him that she had received the $250, and had credited it on his (Pennybaker's) receipt for the claim. It is very apparent that Mrs. Stubblefield was not willing to receive more Confederate money than she could use in defraying her expenses, and when Hatterman paid her this money she was disinclined to receive it, because she apprehended that she could not make use of it; and this, we think, was the extent of the opposition made by her to the receipt of it. Our conclusion, therefore is, that the payment of this $250 was a valid payment; what

became of the balance due of $29.50 paid to Pennybaker by Norwood (the Clerk) does not appear. The inference is that it was paid to Johnson and wife. At all events, the payment to Pennybaker (the collecting officer) was a valid payment, and extinguished the debt, a fact to be borne in mind, as it is important in another aspect of this case to be presently considered.

2. The next question to be disposed of in this case arises on a bill filed by John H. McDowell against Johnson and wife, H. B. Stubblefield and Melville Hatterman, and in order to show the issue made by them, the following statement of facts is thought necessary:

It should, perhaps, have been mentioned before that besides the judgment already mentioned, Mrs. Stubblefield, as the executrix of her former husband, obtained another judgment before Purvis for $114.57 and costs, on the 30th day of March, 1861, against Roland, Green Blackburn and Michael Blackburn. An execution issued on this judgment, and came to the hands of Pennybaker (a constable), and was by him levied on this same sixty acres of land, as the property of Roland, on the 14th day of September, 1865. At the following term of the Circuit Court, beginning on the 2d day of October, 1865, the land was condemned to be sold to satisfy this judgment. It was sold under a *venditioni exponas* on the 6th day of January, 1866, and bought by the complainants (Johnson and wife). Such is the title of the com-

plainants (Johnson and wife). On the other hand, it is shown by McDowell's bill and by the proof in the cause that as early as the third day of January, 1861, Roland conveyed the land in trust to John Gribble to indemnify his sureties on these several debts thus described: "A note to H. B. Stubblefield, in the sum of $240, with M. Hatterman security; also (2) one note that Uriah Jaco holds for $112, R. B. Lane security; and (3) $50 to A. J. Brown, stayed by the said R. B. Lane." The first named debt is identified as the one on which the judgment of $250, so often referred to, was obtained. The counsel of complainants suggest in argument that the "Jaco" debt is the same debt probably of $114, on which Johnson and wife sold the land. But we are satisfied it is not the same debt, and note the fact here to avoid a discussion which that hypothesis could lead to. The trustee (Gribble) was authorized to sell the land (and also some personalty conveyed), if the debts remained unpaid at the expiration of eight months for cash and at public sale. He did not however sell, and in fact seems to have done very little in execution of the trust deed. On the 6th of October, 1865, the deed of trust remaining unexecuted, the complainant (McDowell) bought the land from Roland, at the sum of $350. He took the deed of Roland for the land, and also the deed of John Gribble (the trustee). McDowell states very positively that he knew nothing of any indebtedness of Roland at the time, except $35, that the beneficiaries

in the deed told him was unpaid, and this he furnished to Roland to pay off, and he did pay it off. This $35 is no doubt the money that went to pay the balance of the Stubblefield judgment of $255.80. McDowell further states that he bought in good faith, and no evidence contradicts him on these points. He further insists that the levy of the execution on the land, by virtue of the judgment in favor of Johnson and wife, was void, because at the time it was made —namely, on the 14th of September, 1865, the legal title was outstanding in the trustee (John Gribble.)

If at the time the levy was made upon the land the deed of trust to Gribble was a valid, subsisting, and unsatisfied deed, it is plain that Johnson and wife acquired no title to the property by virtue of their levy and purchase under such circumstances. *Hannum* v. *Wallace*, 4 Hum., 143.

The only question that could be made as to the validity of this deed of trust is raised by the statements of John Gribble (the trustee). He states in general terms that "he never accepted the trust." The deed was acknowledged by the bargainor (Roland) on the day after its execution, and was, on such acknowledgment, properly registered. This, however, it would seem of itself would not be sufficient to vest the *legal title* in the trustee without his subsequent acceptance; for the *delivery* of a deed of assignment is just as essential, it seems, to complete the conveyance, as in the case of a common law deed. If, then, Gribble had rejected this deed and refused to

have any thing to do with it when it came to his knowledge, that would perhaps have had the effect of re-vesting the *legal* title in the grantor (Roland) by a species of his remitter, although his dissent could not affect the right of the beneficiaries to have the *trust* executed for their benefit by a Court of Chancery. *Watts* v. *Targent*, 6 Penn. R., 329; 2 Sneed, p. 164.

We are saved, however, the necessity of discussing these questions by a critical examination of the testimony of Gribble. It is plain, we think, that he did accept this trust, notwithstanding his disclaimer. When he is asked what became of the deed of trust, he states that he gave it to McDowell to show to Norwood, and had not seen it since; thus plainly implying that he did take possession of the deed, and undertook in the first place to carry out its provisions. It is very palpable to our minds that Gribble's disclaimer resulted from a consciousness that he had failed to do his duty about this trust property, and was prompted by the fear of being called to account for it.

Our conclusion, therefore is, that there was a valid, legal outstanding title in Gribble (the trustee) at the time the execution was levied in favor of Johnson and wife, and therefore they acquired no lien on the property thereby. The title had not reverted to the assignor (Roland) at this time, because the debts provided for in the trust deed had not been fully paid. Neither did it revert before the

sale under the execution, or at any time, for we also think that the deeds of Gribble and Roland of the 6th of October, 1865, conveyed a good title to McDowell to the land in suit.

There is, as we think, no evidence that this was a fraudulent contrivance between Roland and McDowell, there being no evidence that disproves the positive averment of McDowell that he had no knowledge of the existence of any debt of Roland's except the debts provided for in the deed of trust.

3. The complainants can have no relief under the bill filed by them against Gribble and McDowell and Roland to have this deed of trust executed for their benefit, for the reason that their debt of $256.80 secured in this deed of trust is and was satisfied at the time they filed their bill.

It will be seen that we have not discussed the regularity or propriety of the mode of procedure to which the several parties have resorted to assert their rights. They have not seen proper to interpose objection themselves, and we are content to declare their rights resulting from the facts disclosed in this Record.

Upon the whole case we conclude that the defendants, Roland, Hatterman and Blackburn, are entitled to have it declared by decree of this Court that the judgment of $250 against them is satisfied and extinguished. We think, also, that McDowell has the right to have it declared by the decree of this Court that the sale and purchase of Johnson and

wife at the execution sale is a cloud or incumbrance upon the title that he acquired by his purchase from Gribble (the trustee) and Roland, which he has the right to have removed. The several bills of Johnson and wife must be dismissed at their cost. But the complainant in the cross-bill (McDowell), we think should pay the costs that occurred under the filing of his bill both in this Court and in the Court below. The decree of the Chancellor is reversed and a decree will be entered here modified in accordance with this opinion.

Joseph Lowenheim *v.* Lockhard Ireland.

## JOSEPH LOWENHEIM *v.* LOCKHARD IRELAND.

1. ATTACHMENT. *Ancillary. Affidavit.* If the affidavit for an ancillary attachment fails to state the nature and character of the plaintiff's demand, and fails to state in what Court the suit at law to which it is ancillary was commenced, and the recitals in the attachment writ are alike defective, an attachment issuing upon such affidavit is illegal and void.

2. PLEA IN ABATEMENT OF ATTACHMENT. *When defective.* Defendant pleaded in abatement of attachment "that before the suit was instituted, he had made an assignment of his property for the benefit of his creditors; that the assignee had taken possession of the property, and that the deed of assignment had been registered." On demurrer, held to be defective, in failing to make profert of the deed of assignment, or in stating that the assignment was *bona fide* and not fraudulent.

3. PLEADING AND PRACTICE. *Person interested in subject matter not allowed to become party to suit. When.* A trustee in possession of goods, attached as the goods of his assignor, is not allowed to become a party defendant to the attachment, on showing himself interested in the subject matter of the suit, under § 2799 of the Code.

FROM DAVIDSON.

Appeal from the Circuit Court. M. M. BRIEN, Judge.

HORACE H. HARRISON and MAX DINKELSPIEL for Joseph Lowenheim.

M. M. BRIEN, Jr., for Lockhard & Ireland.

NICHOLSON, C. J., delivered the opinion of the Court.

Joseph Lowenheim *v.* Lockhard Ireland.

On the 20th of December, 1866, Lockhard & Ireland commenced a suit, by summons, against Joseph Lowenheim, in an action to their damage $2,000. The summons was executed on the same day, and made returnable to the January term, 1867, of the Circuit Court of Davidson County.

On the same day they filed their affidavit before the Clerk of the Circuit Court of Davidson County, stating that Jos. Lowenheim is justly indebted to them in the sum of $1,000, and that he had fraudulently disposed of his property, praying for an attachment ancillary. An attachment was issued, returnable to the January term, 1867, of the Circuit Court, and reciting that "this attachment is ancillary to a suit at law this day commenced by Lockhard & Ireland against said Lowenheim." The attachment was levied on a stock of goods as the property of Lowenheim and sold by the officer, and the proceeds paid into Court, and by the Court ordered to be loaned out, giving plaintiffs the preference as borrowers.

At the January term, 1867, plaintiffs filed their declaration, alleging that defendant (Lowenheim) was in debt to them by account for goods, in the sum of $1,003.06. Defendant (Lowenheim) appeared and filed his plea in abatement of attachment, alleging that before the suit was commenced he had made an assignment of his property to Max Dinkinspeil for the benefit of his creditors; that the assignee had taken possession of the property, and that the deed of assignment had been duly registered.

Joseph Lowenheim *v.* Lockhard Ireland.

To this plea plaintiffs demurred, because the deed of assignment was not set out, and because defendant does not allege that the assignment was *bona fide.*

At a subsequent day of the term, Max Dinkinspeil filed an affidavit that he was interested in the subject matter of the suit, asking to be allowed to defend. The Court granted the request, and thereupon he filed a plea in abatement, traversing the allegation in plaintiffs' affidavit for the attachment.

At a later day of the term, the Court, on motion of plaintiffs, rescinded the order allowing Dinkinspeil to defend, and striking out his plea in abatement. The Court then proceeded to sustain plaintiffs' demurrer to Lowenheim's plea in abatement, giving him two days to plead over. Upon his failure to plead, judgment by default was taken and a jury was impannelled to inquire of the damages. The jury assessed plaintiffs' damages at $1,025.62, for which judgment was rendered. From this judgment Joseph Lowenheim has appealed in error.

1. The attachment was illegally issued, and was void. The affidavit fails to state the nature or character of the plaintiffs' demand, nor does it state in what Court the suit at law to which it is ancillary was commenced. The recitals in the attachment writ are alike defective.

2. The demurrer to Lowenheim's plea in abatement was properly sustained. The plea was defective in failing to make profert of the deed of assignment

or in stating that the assignment was *bona fide*, and not fraudulent.

3. There was no error in the action of the Court in rescinding the order allowing Dinkinspeil to become a defendant. Section —— of the Code provides for such substitute or addition of parties to defend, when the suit is for recovery of specific property. It was no error, at the same time, to rescind the order erroneously made at a former day of the term. Nor was it error to strike out Dinkinspeil's plea in abatement; but as Dinkinspeil has not appealed, the regularity of the proceedings can not be looked into in this Court.

4. There was no error in allowing plaintiffs to take judgment by default, upon the failure of defendant (Lowenheim) to plead. As the damages were assessed by a jury, the judgment was regular.

It results that the judgment against Lowenheim is affirmed, but the attachment and the proceedings under it are void. The costs of the attachments and proceedings under it will be paid by plaintiffs. The other costs of the Court below and of this Court will be paid by defendant (Lowenheim).

Mary A. Wright *v.* B. Dufield *et al.*

## Mary A. Wright *v.* B. Dufield *et al.*

1. Feme Covert. *Privy acknowledgment. Defective. When.* Where the Clerk's certificate fails to recite that the deed was signed by the married woman, "voluntarily and understandingly," it is defective for such failure; her title is unaffected thereby, such deed carrying with it no legal significance, and the same may be declared void at her instance.

   Cases cited: W. J. Anderson *v.* J. W. Beverly, MSS. at Knox.; Henderson *v.* Rice, 1 Cold., 223.

2. Title Bond. *Insufficient to pass the title of a married woman. When.* A title bond, though duly executed and certified in every respect, is insufficient to pass the title of a married woman in land. Her title can be divested only by the joint deed of herself and husband, executed in compliance with the forms prescribed by law. Nor can she be forced specifically to execute such agreement.

   Case cited: Robert Mosely *v.* B. L. Porter, MSS.

3. Same. *Rescision of sale. Purchase money restored. Lien on land. Persons under disability.* Where a sale is rescinded the vendor will be compelled to restore the purchase money, and the amount paid will be held a lien upon the land, even against a lunatic or married woman; but these conditions will not be imposed if the purchaser was guilty of fraud or imposition in procuring the deed.

   Cases cited: Heis. Dig., 466; Pilcher *v.* Smith, 2 Head, 212; Hilton *v.* Duncan, 1 Cold., 313.

4. Same. *Same. Attorney's lien.* Though the lien for the purchase money on the corpus of the property is prior to the solicitor's lien for fees, still the same does not extend to rents and profits accrued, and out of such the counsel's fee will be allowed.

FROM FRANKLIN.

Appeal from the Chancery Court. William P. Hickerson, Presiding.

Jesse Arlege and P. Turney for Mary A. Wright.

Mary A. Wright *v.* B. Dufield *et al.*

COLYAR, MARKS & FITZPATRICK for B. Dufield and Wife.

BURTON, Special J., delivered the opinion of the Court.

In the latter part of the year 1867, the complainant, then the widow of ——— Buchanan, went to reside in the town of Winchester, County of Franklin. In November, 1867, she bought of Mrs. Agnes E. Colyar, wife of A. S. Colyar, the house and lot in Winchester, the property in this litigation. Soon after her removal to Winchester, and in February, 1868, she intermarried with the defendant, R. S. Wright. On the —— day of July, 1868, complainant and her said husband sold and conveyed by title bond the lot in suit to the defendant, Whitfield Ransom, for the sum of $3,000. The title bond was in the usual form, except that the obligors bound themselves to convey to Ransom, "or whomsoever she should designate." In point of fact, Ransom made the purchase for the defendant, Mrs. Dufield, at the request of her husband.

It also appears that the understanding and agreement of the parties was, that the deed was to be made as soon as the money could be had from New York, where it seems Dufield had it on deposit. The money was received in a few days, and on the 10th of August, 1868, the $3,000 was paid to the complainant; and on the same day she joined with her husband in a conveyance in fee of the lot to

the defendant, Mary E. Dufield. On the 3d of September, 1868, the complainant filed her bill, in which she alleges that the deed was obtained from her by the mingled falsehood, cajolery and brow-beating of the defendant, her husband, R. S. Wright. She further insists that the deed is void and inoperative, because D. R. Slatter, who took, or pretended to take, her privy examination, was neither a clerk or deputy clerk, or otherwise empowered to take the same.

The prayer of the bill is, that the deed be declared void, and that the title to the property be revested in her. The facts on which the deed is impugned for fraud will be more fully adverted to hereafter.

We deem it unnecessary to discuss the power of Slatter to take the acknowledgement and privy examination of the complainant, because the same is fatally defective on its face, as certified by Slatter. It recites that she acknowledged the signing of the deed of her own free will, without any constraint or compulsion on the part of said husband. It is seen here that the words "voluntarily and understandingly," prescribed by the Code, are wholly omitted in this certificate. In the case of *W. J. Anderson* v. *J. W. Beverley*, MSS., lately decided at Knoxville, it is held that the omission of the word "understandingly" in the certificate of the privy examination of a *feme covert* is defective, and the acknowledgement of the deed was held a nullity.

It is true, that in the case referred to, it was held that the defective probate in that case was correct, because the deed had been registered for more than twenty years. But we are content with the reasoning of that case, and on the authority of it we hold this probate defective. The certificate being fatally defective, the deed can have no legal effect whatever, and complainant's title to the lot is not affected by it. *Henderson* v. *Rice*, 1 Cold., 223.

But it is insisted by the defendant that, inasmuch as the title bond in this case was duly executed and acknowledged, and complainant has received the purchase money, she holds the naked legal title as trustee for the bargainors, and the Court should divest it out of the complainant and vest it in the defendant, Mary E. Dufield. It is a sufficient reply to this argument that when the title bond was surrendered on the execution of the deed, it was no longer available for any purpose.

In the case of *Robert Mosely* v. *B. L. Porter*, MSS., it is held by this Court that a title bond, though duly executed and certified in every respect, is ineffectual to pass the title of a married woman in land, and that her title can be divested only by the "joint deed" of husband and wife executed in compliance with the forms prescribed by law. And it is further held that she can not be forced specifically to execute such agreement.

It follows from these authorities that the complainant is entitled to have the deed in this case

declared void by the decree of the Court. But the defendants, in their answer, which is filed as a cross-bill, also insist that if this be so, they having paid the purchase money, have the right to have the same repaid, and also to have it declared a lien on the property. The bill in this case is, in substance, a bill to rescind the contract about the land in suit.

On the rescision of a sale it is the settled practice in this State to require of the vendor, as incident to the relief granted him, to restore the purchase money he has received; and the amount paid upon the purchase will be held a lien upon the land, even against a lunatic or a married woman. Heis. Dig., 466, and authorities there cited.

The vendor is bound, upon an immutable principle of natural justice, to refund the purchase money before being entitled to demand back the property sold. 2 Head, 212. In the case first cited the decision was rested on the ground that there was positive fraud and imposition on the part of the married woman, and on principle this we think is right. But in subsequent cases it is held that the same mere effort to avoid the contract without restoring the purchase money is itself a fraud, which will not be permitted. 1 Cold., 313.

In *Smith* v. *Evans* this doctrine applied to a minor seeking a rescision, with the limitation, however, that the contract on the part of the purchaser must be free from the imputation of fraud or imposition, and we perceive no good reason why the same

limitation should not exist in case of the other disability of coverture.

We proceed then to inquire whether, in the case in hand, the purchaser is repelled by fraud. The complainant alleges in her bill that she never did consent to the sale of her lot. She says that the defendant, her husband, procured her to sign the bond and deed by falsely pretending to her that he would purchase the boarding-house connected with Mary Sharp College; that he would refit it and make a deed of gift of it to complainant. This he did not do, but, as she says, he possessed himself of the money paid for her house, left her and has absconded. So far as the defendant, Wright, is concerned, there is no doubt that he practiced a cruel fraud upon complainant, and every principle of justice would prompt us to give her any measure of relief consistent with the just rights of other innocent persons.

We do not understand that the other defendants, or either of them, are distinctly charged with complicity in these fraudulent designs of Wright. It is said, to be sure, that Ransom took an active part in having the title bond and deed prepared, while the purchase was, in fact, for Mrs. Dufield. And it is further alleged that Ransom had, or had had some interest in the contract, but what interest was unknown to complainant. It is further insisted in argument that the putting Ransom forward to make the foreclosure was a fraudulent contrivance to induce

the complainant to part with her property when it was known to defendants that she was averse to doing so, at least to the defendant Dufield. Ransom and Dufield both deny all these charges. They both say that Ransom had no interest in the trade. The explanation given of the fact that Ransom intervened in the transaction is, that Wright and complainant were both somewhat at outs with Dufield, because he had taken part against Wright in some negotiations about the boarding-house, and for the further reason that Ransom was known to be pecuniarily prompt and reliable. And Ransom positively swears that he never negotiated for the place until he had been told by the complainant, in the absence of her husband, that she desired to sell it. It should further be observed that, according to the complainant's own showing, the full amount of the purchase money was paid into her own hand. Indeed, as to $2,300, she says she loaned it to her husband and took his note for it, her brother being present, and writing the note. And although she says that her husband absconded with all the money, the proof convinces us that she retained and actually used a considerable portion of it.

The fact that the money was paid to complainant is not without weight. It need not be suggested that this is the same thing as paying to the husband. The ancient common law maxim that the wife's legal existence is merged by the marriage, and that she is in legal intendment, *sub potestate viri*,

must be accepted only with material modifications. She may, even by contract with the husband, acquire rights enforceable in the Courts, and that she has a legal independent existence is evidenced in the daily administration of justice, and is asserted with sufficient energy in every-day life.

Our conclusion is, that the unfortunate sale of this property resulted from the over-confidence of complainant in her husband, and not from the fraud of defendants. And while we declare the sale of the property void, we are not warranted by any thing disclosed in the record in denying to defendant, Dufield, the wanted relief of requiring the restoration of the purchase money, and declaring the full amount of it a lien on the property. It appears that the property has been placed in the hands of a receiver, and has by him been rented out. The complainant is entitled to the rents and profits to be deducted from the purchase money and interest.

The decree of the Chancellor is reversed, and a decree will be entered here in accordance with this opinion, and the cause is remanded to the Chancery Court to be proceeded in. The costs in this Court will be paid by the defendants; the costs of the Court below are not adjudged, but left to the future adjudication of the Chancellor.

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Since the foregoing opinion was prepared, application has been made on behalf of the solicitors of

complainant in this cause to have a lien declared in their favor for their reasonable fees in and about prosecuting the cause; and the further application is made to have the rents accrued since the property was taken out of the hands of complainant devoted to the payment of the same. We are not satisfied that we can declare the lien of the solicitor prior and superior to the lien of defendant Dufield for the purchase money, on the corpus of the property in litigation. But we do not think that the lien for the purchase money does extend to the rents and profits of the house and lot, and see no reason why the application of the solicitors should not be allowed, so far as the rents are concerned. On the cause being remanded, therefore, the Chancellor will have a reference to ascertain what is a reasonable fee for the solicitor's services in this cause, and the rents accrued since the property was taken out of the hands of complainant will be applied in satisfaction of the same.

BY THE COURT.—Let the defendants pay all the costs of this Court and Court below.

Willey & Kelly *v.* Roirden & Ward.

## WILLEY & KELLY *v.* ROIRDEN & WARD.

1. PLEADING AND PRACTICE. *Attachment. Affidavit defective. When.* An affidavit for attachment is defective in failing to state the nature of the debt claimed, whether by note, bill of exchange, account, or breach of contract.
2. SAME. *Same. Supreme Court.* Where the Circuit Judge refuses improperly to quash, upon defendant's motion, process by which he is brought into Court, and requires the parties to plead, the Supreme Court will correct such error, if apparent upon the record, and render the proper judgment, treating all subsequent proceedings as a nullity. Nor is the filing of a plea in abatement such an appearance as will give the Court jurisdiction of the person, and correct the error.

Cases cited: Sullivan *v.* Fugate, 1 Heis., 20; Berr *v.* Rahl, 1 Heis., 12.

FROM DAVIDSON.

Appeal from the Circuit Court. EUGENE CARY, Judge.

GUILD & SMITH for Willey & Kelly.

E. B. MCCLANAHAN for Roirden & Ward.

NICHOLSON, C. J., delivered the opinion of the Court.

In October, of 1866, Willey & Kelly filed their affidavit for an original attachment before a Justice of the Peace, in which they stated "that Roirden & Ward are justly indebted to them, after giving all

just credit, the sum of $51.75, and that B. F. Ward is a non-resident of the State of Tennessee," etc.

Attachment was issued by the Justice, returnable before himself, and was levied on a boat and contents, the property of Roirden & Ward. The defendant, Ward, appeared before the Justice and filed his plea in abatement. Roirden, who was served with a process, made no defense. The Justice gave judgment against Roirden & Ward for $51.75, from which Ward alone appealed to the Circuit Court.

In the Circuit Court defendants, Roirden & Ward, moved to quash the attachment and proceedings in the case, which motion was overruled. Thereupon a jury was empanneled to try the plea in abatement, which denied that defendant Ward was a non-resident of the State. The jury found that he was not a non-resident of the State, wherefore judgment was rendered in his favor, from which Willey & Kelly have appealed.

It is assumed in the argument that because Ward's motion in the Circuit Court to quash was overruled, and he took no exception, and because the case comes here on the appeal of plaintiffs, Willey & Kelly, therefore the question as to whether the motion to quash was correctly overruled is not before the Court, and that the only question before this Court is as to the rulings on the proceedings in the matter of the plea in abatement.

This is a mistake; the record shows the action of the Court in the motion to quash the attach-

ment, and there was, therefore, no necessity for the defendant, Ward, to except. The error of the Court, if it be one, is apparent on the record, and it was an error from which he could not appeal. The appeal of Willey & Kelly from the judgment in favor of Ward on the plea in abatement brings the whole case before this Court, and presents the question of error in the Court, as well in regard to the refusal to quash, as to the proceedings on the plea in abatement.

The motion to quash the proceedings on the attachment is based upon the failure of the plaintiffs to state, in their affidavit, the nature of the debt claimed, whether by note, bill of exchange, account, or breach of contract. The statement is, "that Roirden & Ward are justly indebted to them, after giving all just credit, the sum of $51.75." This affidavit is fatally defective. *Sullivan* v. *Fugate*, 1 Heis., 20. Nor was the filing of the plea in abatement such an appearance as gave the Court jurisdiction of the person. *Berr* v. *Rahl.*, 1 Heis., 12.

As this error is conclusive of the case, it is not necessary to notice other questions discussed in the argument of counsel. The jndgment below, quashing the attachment, will be affirmed, but for the reason that it ought to have been quashed on motion, and not on the finding of the jury on the plea in abatement, all the proceedings after the overruling of the motion to quash being void.

James Kannon *v.* Wm. Galloway.

## JAMES KANNON *v.* WM. GALLOWAY.

1. PLEADING AND PRACTICE. Non est factum. *Exclusion of use of microscope by jury. Error. Evidence.* Where parties consent, signatures not in the record may be submitted to the jury as genuine, for comparison with the signature in controversy, and to aid them in the determination of such a question, microscopes may be used.
2. SAME. *Same. Affidavit.* An affidavit which states that affiant was ignorant of certain evidence until after verdict, but fails to show that he was unable to procure the testimony of other experts, who would have proven the same fact, is insufficient.

FROM MAURY.

Appeal from the Circuit Court. T. M. JONES, Special Judge.

FRIERSON & FLEMING and MYERS, LOONEY & WHITTHORNE for Galloway.

WM. P. MARTIN and A. M. HUGHES for James Kannon.

DEADERICK, J., delivered the opinion of the Court.

Galloway brought this action against Kannon in the Circuit Court of Maury County, upon a note for $10,671.85. Kannon pleaded *non est factum*, and upon the trial the jury rendered a verdict for Galloway for the amount of the note and interest, and a new trial having been refused, Kannon appealed in error to this Court.

Several affidavits were presented upon the motion for a new trial, of persons professing to be experienced and skillful in determining the differences be-

tween genuine and forged signatures; affiants express the opinion that the note sued on is a forgery.

Kannon states in an affidavit that he did not know that he could prove the facts by those witnesses stated in their affidavits, until after the verdict of the jury was rendered, except as to one of them, whose attendance he could not procure. Why he could not procure the attendance of the affiant last referred to, is not stated; nor is it stated that there were not other experts by whom he could have proved the same facts, whose attendance he could have procured.

There was much testimony upon the trial *pro* and *con*, upon the genuineness of the signature to the notes sued on; *non est factum*, being in fact the only plea pleaded by defendant below. The affidavit does not show that any effort was made to procure the evidence of experts, and we do not think that these affidavits show any sufficient reasons why this Court should reverse, in order that plaintiff in error should have a new trial.

Only one other error is seriously urged why the judgment should be reversed. From the record it appears that on the trial some eighteen signatures of Kannon to notes and other instruments, which were admitted by both parties to be genuine, were by consent allowed to go to the jury for the purpose of being compared by them with the signature to the note.

Where the parties to the suit consent that signa-

tures not in the record, but which they admit to be genuine, may be submitted to the jury, to be compared by them with the signature in controversy, the jury may make the comparison to aid them in the determination of the question submitted.

When the jury were about retiring to consider of their verdict in this case, the defendant below, by his counsel, asked permission of the Court to furnish the jury magnifying glasses, that they might examine the writings admitted to be genuine, and compare the same with the note in controversy, which the Court refused, but said to the jury that they might use their own spectacles. This, it is insisted, is error. If, as we infer the fact to be, from the permission asked and the peremptory refusal of the Court, the jury desired the use of magnifying glasses to aid them in the examination of the signatures submitted to them, we are unable to see any satisfactory reason why they should not have had them. The nature of the evidence submitted to them, with the differences testified to in the signatures submitted, required of the jury close and careful inspection and comparison of the several signatures.

Several witnesses were allowed to testify as to the resemblance and dissimilarity of some of the letters in the signature to those of the other signatures in the case; so also they testified as to whether the two "n's" in "Kannon" were joined together or disconnected. Other peculiarities were referred to, some of which were scarcely discoverable to the naked eye. By means of

a magnifying glass the peculiar features and characteristics of each signature could be much more clearly seen and understood.

Why a jury should not be allowed the use of means to aid them in the examination and comparison of hand-writing submitted to them to be examined and compared, which have been found by the experience of bankers and business men of the highest utility for such purpose, we are unable to understand. There is no more mystery in such a glass than in ordinary spectacles in daily use. An unlearned man, other things being equal, can see through such glasses quite as well as the most learned.

The jury, under the agreement of the parties, were charged with the duty of weighing the testimony of the witnesses, and of investigating for themselves, by inspection, all the signatures submitted to them, and founding their verdict upon the testimony and the conclusions they might draw from a careful inspection and comparison of the signatures.

If the means were at hand and offered to them, and they desired to avail themselves of them to facilitate such inspection, it was error to refuse to allow them the use of such means.

For these reasons we think the Circuit Judge erred in his ruling on this point, and we reverse the judgment and remand the cause for a new trial.

G. Brazelton, Pl'tiff in Error, *v.* Colyar & Gardner, Def'ts in Error.

## GREEN BRAZELTON, Plaintiff in Error, *v.* COLYAR & GARDNER, Defendants in Error.

AGENCY. *Individual liability of government agent.* A government agent can not be held personally liable where the party with whom he deals is aware of such agency, and a promise by a sub-agent to pay when he receives money from his principal will not make him personally liable.

Cases cited: Amison & Davy *v.* Ewing, 2 Cold., 367; Story on Agency §§ 302 and 304.

FROM FRANKLIN.

Appeal from the Circuit Court. WM. P. HICKERSON, Judge.

J. J. WILLIAMS for Brazelton.

J. B. FITZPATRICK for Colyar & Gardner.

BURTON, Special J., delivered the opinion of the Court.

The plaintiff in error sued the defendants in error in the Circuit Court of Franklin County, to recover $1,100, the value of a lot of hogs sold, as he alleges, to defendants. The defense relied upon was that they (the defendants) were the agents of the Confederate Government in making the purchase; that they contracted with the plaintiff in that character, and insist that they therefore are not responsible to the plaintiff for the value of the hogs. The verdict and judgment of the Court below were against the plaintiff, and he has appealed to this Court.

The error assigned is in the charge of the Court,

and, to the proper understanding of this objection, it is proper to give a very concise statement of part of the evidence. John G. Brazelton bought the hogs for the defendants; he had frequent conversations with plaintiff, both before and after the trade, about defendants being agents of the Confederate Government, and it was well known to plaintiff that they were such agents.

The plaintiff, on examination, proves that he delivered the hogs to the defendants, and they told him they would pay him when they got the money from Cummings, for whom they purchased. E. F. Colyar (one of the defendants) proves that he bought the hogs for the Confederate Government; that plaintiff knew of this fact; that he was acting as agent for Cummings, the General Commissary for the Confederate Government; admits that he told plaintiff he would pay him for the hogs when the money was received from Cummings, but says that he never did get the money from Cummings; he admits that he gave no voucher to the plaintiff, but says further that the plaintiff asked him for none.

The error in the charge insisted on is contained in this clause: "If you shall believe from the evidence that defendants acted as agents of the Government, or as agents of Cummings, and that the contract was that defendants were to pay for the hogs whenever they received the money from Cummings, their principal (if he was such), then the defendants

would not be liable unless they received the money from Cummings."

It is insisted for the plaintiff that the promise of the defendants to pay when they got the money from Cummings was a personal obligation, and that they were bound to pay at all events, whether they got the money of him or not.

In Story on Agency it is said that in the ordinary course of things an agent contracting on behalf of the government, or of the public, is not personally bound by such a contract, even though he would be by the terms of the contract if it were a private agency; the reason given being that it is not to be presumed either that the agent means to bind himself personally in acting as a functionary of the government, or that the party dealing with him as a public agent means to rely upon his individual responsibility.

In the further discussion of the subject it is said that the same principle applies to cases where public officers, contracting for a public purpose, afterwards, upon settlement of accounts with the other contracting party, strike a balance, and in writing promise to pay the balance on a given day, signing their names officially, for such a written document is quite consistent with an intention not to incur any personal responsibility, but merely to apply the public funds which might be in their hands at the time prescribed towards the discharge of the public debt. Story on

Agency, §§ 302 and 304; *Amison & Davy* v. *Ewing*, 2 Cold., 267, is to the same effect.

We think the foregoing principles are applicable to this case. The promise to pay when funds came from Cummings (the commissary of the army) being equivalent to a promise to pay out of public funds, and repelling the idea that the defendants meant to incur a personal liability. The matter of fact being known to plaintiff when he sold and delivered the hogs that defendants were acting for Cummings, who he further knew was purchasing commissary, he must have meant to deal with them as public agents, and could not construe their promise into a personal engagement to pay. We think the instructions of his Honor, the Circuit Judge, are in accordance with these principles. We find no error in the record and the judgment is affirmed.

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## WILLIAM D. GOLD *v.* JOHN A. FITE.

1. ELECTION. *Contest. Effect of. Pending.* A contest of election, by adverse claimant of the office of Chancellor, does not operate to vacate the office pending the contest, nor to confer upon the Governor the power to appoint a Chancellor *pro tempore.*
2. GOVERNOR. *Power of appointment. Appointment. When good.* Where a vacancy occurs by the death of the Chancellor, the Governor has the power to fill the vacancy by appointment, until the next biennial election, which shall be held more than 30 days after the vacancy. And where the facts exist which authorize the appointment it will be good, though the Governor in making it, acts upon the erroneous assumption that he is fill-

ing a vacancy caused by the resignation of a Chancellor who was only such *de facto*.

Constitution, Art. 7, Sec. 4; Art. 11, Sec. 1, and Sections 312, 313, 314 and 315.

3. OFFICE OF CHANCELLOR. *Right to. Whence derived.* The right to the office of Chancellor is perfected by the election, and the fact that he died without being commissioned, did not render him the less a Chancellor while he lived, and his death created a vacancy in the office which may be filled *pro tempore* by the Governor.

4. CHANCELLOR BY GOVERNOR'S APPOINTMENT. *Powers of.* A Chancellor appointed by the Governor in pursuance of the law is clothed, while he continues in office, with all the powers of a Chancellor elected by the people; and his appointment of Clerk and Master for the constitutional term of that office is valid.

5. CLERK AND MASTER. *Office of. Vacant when. Under the schedule.* The accidental fact that no Chancery Court was held at Carthage after the adoption of the Constitution of 1870, until August, 1871, did not have the effect under the second paragraph of the first section of the schedule of the Constitution, to continue in office a Clerk and Master who had been appointed on the 14th day of February, 1865. But on the contrary, the office was then vacant, and subject to be filled by the Chancellor of the District at that time.

6. RULES AND PRINCIPLES FOR CONSTRUING CONSTITUTIONS AND LAWS. Schedule to Constitution; nature of defence; Jamison on Constitutional Convention, 95; The State *v.* The Clarksville & R. T. P. Co.; 2 Sneed, 88; Ledg. on Stat. and Const. Law, 234.

7. DECREES. *Plea of coram non judice.* Where parties fail to interpose the plea of *coram non judice* the decrees of a Chancellor *de facto* will be binding upon them.

FROM SMITH.

Appeal from the Chancery Court. WILLIAM G. CROWLEY, Judge.

R. CANTRELL and A. A. SWOPE for Gold.

JAMES W. MCHENRY and JOHN W. HEAD for Fite.

William D. Gold *v.* John A. Fite.

BURTON, Special J., delivered the opinion of the Court.

This is a contest for the office of Clerk and Master in Chancery, for the County of Smith, John A. Fite claiming the office by appointment made on the —— day of August, 1871, by Chancellor Goodpasture, and William D. Gold claiming under appointment of the present Chancellor, Crowley, made at the October Term, 1872, of the Chancery Court at Carthage.

At the term of the Chancery Court last mentioned, Gold was appointed and inducted into office. Fite, claiming and holding the office under his former appointment, excepted to the proceedings. A Bill of Exceptions is signed by Chancellor Crowley, and in this way the parties have seen proper to assert their relative claims to the office in suit.

The facts necessary to a decision of the case will be best shown by stating them in connection with the several propositions of law argued in the case, and to which they refer.

1. The first position assumed by the counsel of Gold is, that when Fite was appointed, in August, 1871, there was no vacancy in the office, but that the same was then filled by one David H. Campbell, who was not removed, and whose term of office had not expired. Campbell was first appoined to office on the 14th day of February, 1865, by the then Chancellor, Shackleford. He held the office until the 20th day of February, 1871. On that day the appellant, John A. Fite, was appointed Clerk and Mas-

ter by Chancellor Goodpasture. It should be noted here, though somewhat out of its order, that Fite was twice appointed; once, as above stated, on the 20th of February, 1871. Under this appointment he held the office until the 21st of August following, when he resigned, and was immediately re-appointed by Chancellor Goodpasture.

2. The argument that Campbell was the regular incumbent of the office at the time both of the first and last appointment of Fite, is predicated upon the construction given by counsel to the second paragraph of the first Section of the Schedule of the Constitution of 1870, which is in the following words:

"Officers appointed by the Courts shall be filled by appointment, to be made and to take effect during the first term of the Court held by judges elected under this Constitution."

It is said that the October Term, 1872, was the first term of the Chancery Court for Smith County held by a Judge "elected" under the New Constitution,. and that although the constitutional term of Campbell of six years had expired, it was extended by the Schedule until the term of Court held as aforesaid, at which time the appointment of his successor was to take effect.

There is no doubt that, by the constitutional provision above referred to, it was contemplated that the appointment of Clerks and Masters in Chancery throughout the State should be made and take effect at the time really indicated in the Schedule. The term of

office of the then incumbents was, as it lawfully might be, subjected to a kind of procrustean process, by which it was lopped off, or extended, to meet the constitutional requirement.

A proper construction of the Schedule determines whether Campbell's term of office expired, but the case involves the more serious inquiry, as to whether Goodpasture's appointment as Chancellor was warranted by law, and did it confer upon him the power of appointing at the time he exercised it? And before giving our views of this question, we proceed to state such facts in regard to it as will render intelligible our solution of this question.

The Fifth Chancery Division, composed in part of the County of Smith, was created by the Legislature in 1870, and at the first general election for Judicial officers, held under the amended Constitution of 1870, and in August of that year, W. W. Ward was elected Chancellor of that Division. It does not appear from the record whether he was ever commissioned or not; but it does appear, inferentially, that he never held a Court at Carthage. He sickened in November or December, 1870, and after a protracted illness, he died on the 10th day of April, 1871. Soon after Ward's election, one Robert A. Cox contested his election on the sole ground that Ward was disqualified to hold the office, by the 14th Amendment of the Federal Constitution. It is not intimated that there was any irregularity in conducting

the election, or denied that he (Ward) was elected by a large majority.

Soon after the contest arose, W. W. Goodpasture was commissioned to fill the office of Chancellor, pending the contest. Goodpasture soon resigned the office, but was again appointed and commissioned by Governor Senter, on the 25th day of July, 1871. The second commission recites that the appointment was made to fill a vacancy occasioned by the resignation of the said W. W. Goodpasture. But this second appointment, it will be seen, was made several months after the death of W. W. Ward, and was before the second appointment of the contestant, Fite, as Clerk and Master.

On the 24th day of June, 1872, Governor John C. Brown issued his proclamation, ordering an election to fill the vacancy occasioned by the death of Hon. W. W. Ward. At the biennial election of 1872, the Hon. W. G. Crowley was elected Chancellor, and at the first term of the Court, held at Carthage, in October, 1872, he appointed the contestant, Gold, Clerk and Master.

We deem it unnecessary to discuss the contest made by Cox further than to announce that we do not think that it created a vacancy in the office of Chancellor; and, therefore, there was no Constitutional warrant for the appointment of Goodpasture, pending the contest. But to prevent an inference, suggested by argument of counsel in the case, we announce

distinctly that we do not admit that any decree pronounced by Chancellor Goodpasture, while holding under this appointment, was invalid. He was Chancellor *de facto*, and if parties chose to bring their causes to a hearing before him, without interposing the plea of *coram non judice*, then the decrees he rendered were binding upon them. Nor do we think that the validity of Goodpasture's first appointment rests upon the Constitutional and Legislative provision for the appointment of special Judges to hold Courts when the regular Judge shall fail to attend, or be unable to sit.

What provision of law was in force then, in July, 1871, authorizing the filling of vacancies in the office of Chancellor? In solving this question, one consideration of a general nature should be kept steadily in mind. The Constitution of 1870 was not a new Constitution, but in all its main features was a re-enactment of the Constitution of 1834. The same articles and sections are common to both instruments, with the exception of a few, though very important, amendments. Two of these sections have an important bearing on the question under discussion. Article 7, Section 4, of the Constitution of 1834, is in these words:

"The election of all officers, and the filling of all vacancies, that may happen by death, resignation or removal, not otherwise directed or provided for by this Constitution, shall be made in such manner as the Legislature shall direct."

The corresponding Section in the Constitution of 1870 is identical, except that the phrase, "that may happen by death, resignation or removal," is omitted.

Section 1, Article 11, of the Constitution of 1834, is, "all laws and ordinances now in force and use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire, or be altered or repealed by this Legislature."

The corresponding Section of the Constitution of 1870 is in the same words, with the addition, however, of a clause irrelevant to this discussion.

By an Act of 1853, ch. 32, Sections 6 and 7, the Legislature directed how these vacancies should be filled. The substance of this Act is brought forward in Sections 312, 313, 314 and 315 of the Code. The three first Sections provide that the Governor shall order an election, prescribe the notice to be given, and the manner of giving it. Section 315 is in these words: "In the meantime the Governor shall appoint a suitable person to fill the office until the election of a successor."

Was this law in force and use on the 25th day of July, 1871, when Goodpasture was appointed the second time? Clearly it was, unless it was inconsistent with the Constitution of 1870. For it had not expired, or been altered by the Legislature.

It is argued, however, that Section 315 of the Code is repealed by the paragraph of Section 5, Art. 7, already quoted, which provides, in substance, that no special election shall be held to fill a vacancy in

the office of Judge, except at the next biennial election of civil officers, occurring more than thirty days after the vacancy. These paragraphs are clearly prohibitory in their nature, and being paramount to any legislative enactment, did repeal so much of Section 315 as authorized the Governor to order a special election for Judge at a time other than the biennial election of civil officers.

But these clauses do not conflict with the legislative provision that vacancies shall be filled by appointment of the Governor, for the time intervening between the vacancy and the election held to fill it. The utmost that it does is to alter the time at which the Governor shall cause the election to be held, nor is it easy to see how this restriction as to the time of holding the election can be construed into a repeal of a power of the Executive to fill vacancies by appointment.

The Constitutional and Legislative provisions can stand together, the former modifying the latter only in prescribing a definite time for holding an election under its provisions.

If, then, the appointing power remained to the Governor, did the facts exist authorizing him to exercise it at the date of Goodpasture's second appointment? In other words, did a vacancy at that time exist? We have seen that Ward was elected Chancellor. His right to the office was perfected by his election, and the fact, if it be so, that he did not receive his commission, owing to his accidental

sickness, or it may be to the contest about the office, did not render him any less the Chancellor of the Division for the Constitutional term; and consequently the death of Ward did create a vacancy, which the Governor was authorized to fill by appointment. The Governor, however, did not expressly make the appointment to fill the vacancy occasioned by Ward's death, but, as before remarked, to fill the vacancy occasioned by the resignation of Goodpasture. Here is a case where the facts existed authorizing the appointment, but the Governor did not rest the appointment upon the proper ground, but upon a different one; for we hold that the death of Ward, and not the resignation of the first invalid appointment of Goodpasture, occasioned the vacancy.

The learned counsel who opened the case remarked that he had been unable to find precedents precisely in point to sustain his argument. And we fully admit that the case, in several aspects, is one of the first impression with us. But in the absence of controlling authority, we can not declare void an act of the Governor, which it was his right and duty to do, merely because we are of opinion that in his commission he predicates his action upon a wrong state of facts.

If, then, W. W. Goodpasture was properly the appointed Chancellor, it can not be seriously argued that he did not possess the power of appointing a Clerk and Master. Judicial officers have held the office by appointment ever since the government was

established, and so far as we know, it has never been maintained that they were not invested with all the powers and privileges of the office according to the tenor of their commissions.

The remaining question is, whether the occasion had arrived which authorized Chancellor Goodpasture to appoint a Clerk? or, in other words, had the time of office of David H. Campbell, Clerk and Master, expired? And this brings us again to consider the clause in the Schedule of the Constitution, already quoted in this opinion.

The Schedule is that part of a written Constitution in which are comprised provisions deemed necessary—1st, to ascertain the will of the people in respect to the adoption of the instrument, matured by a Convention, as the Constitution of the State; 2nd, to effect, without inconvenience or embarrassment, the transition from the old to the new order of things, and to save rights acquired under existing laws from lapsing by their repeal; 3d, to set up and put in operation the institutions and agencies described in the Constituion so far as not already in operation.

These provisions are mostly temporary in purpose and effect, and although they are some of them of a character more or less fundamental, they seem incongruous with the permanent provisions of the Constitution, properly so-called. Jamison on the Constitutional Convention, 95. These considerations tend to the conclusion that the Schedule had performed its

office when the general election had been held under its requirements in 1870.

It can not be questioned that it was the intention of the Convention that the appointment of Clerks should be made by the Judges elected in August, 1870. It will be remembered that the Convention fixed the time of this election within a few months after they had closed their labors. They knew, of course, that under the laws the first term of the Courts held by them respectively must occur at farthest within six months after their qualification. So that we gather the intention of the Convention to be that this provision in the Schedule, which is temporary in its very nature, would have performed its office before the time of the last appointment of the contestant, Fite. The main intent of the provision is to fix an early time at which the appointment made under it should take effect. As matter of history, we know that these appointments were made in the other Chancery Divisions after the August elections, and they were not made in the Fifth Chancery Division, by reason of an exceptional state of facts that were unforeseen, and wholly unprovided for in the Schedule.

Again, it must be remembered that the terms of office of the then incumbent were extended, not by the direct terms of the Schedule, but only inferrentially from the other fact that their successors were to be appointed after the election of Judges under

the Constitution. And if Campbell's term was extended for two years longer, it is by the merest implication.

The view of this Schedule that would prolong the time of the appointment of the Clerk until a Court was held at Carthage by an elected Chancellor, is a purely literal interpretation, and is not in accordance with the spirit and intention of the Schedule, as gathered from its terms. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter. And a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers, and such construction ought to be put upon it as does not suffer it to be elevated. 2 Sneed, 88; see Ledg. on Stat. and Const. Law, 234.

The case cited (*State* v. *Clarksville Turnpike*, 2 Sneed, 88) furnishes an accurate statement and forcible illustration of the rule that the real intention of the makers must prevail over the literal sense of the terms. The owner of a turnpike road was allowed by the words of the charter to "erect a toll-gate within two miles of Clarksville, and appoint a toll-gatherer thereat." The Court, ignoring a strict adherence to the literal meaning of the words, "within two miles of Clarksville," but giving proper effect to the intention, as deduced from the subject matter, the reason and spirit of the provision, held that the

owner could not place the gate nearer to the town than the two-mile post.

There are some rules of construction peculiar to Constitutional provisions, but we see no reason why this authority is not applicable in interpreting the will of the Convention in this instance.

Without pursuing this reasoning further, we are content to say, that at the time the contestant, John A. Fite, was appointed the term of office of David H. Campbell had fully expired, and that Chancellor Goodpasture had the right to fill the office by appointment.

The result of this opinion is, that the action of his Honor, Chancellor Crowley, must be reversed, and the contestant, Fite, must be again inducted into the office of Clerk and Master at Carthage, to hold for the Constitutional term of six years, from the date of his last appointment. The contestant, William D. Gold, will pay the costs of the cause.

D. H. McNairy *et al. v.* The Mayor and City Council of Nashville.

# D. H. McNairy *et al. v.* The Mayor and City Council of Nashville.

1. Demurrer in Chancery. *Effect of overruling before the Code.* Before the adoption of the Code, after the overruling of a general demurrer to a bill in equity, the defendant might insist upon the same matters in his answer, there being no appeal from such a decree until the final hearing on the merits.

   Cases cited: Dormer *v.* Fortescue, 2 Atkins, 284; Avery *v.* Holland, 2 Tenn., 469; Kirkman & Ellis *v.* Snodgrass, 3 Head, 370.

   Code cited: § 4318–19, § 3157.

2. Same. *Since the Code.* Since the adoption of the Code, and the allowance of an appeal from the ruling of the Chancellor upon a demurrer, the decree of the Supreme Court upon such an appeal, overruling a demurrer and remanding the cause for plea or answer, is conclusive upon that Court, as well as upon the Court below, in the particular case, as to the matters adjudged by the decree.

   Cases cited: Jamison *v.* McCoy, 5 Heis., 108; Cooley's Con. Lim., 47.

3. Adjudications of the Supreme Court. *Binding force.* This Court may make adjudications entirely overlooking statutes or decisions governing the case, and while the decisions may not be good authority in another case, nevertheless for that case they are adjudications, and must have full effect as such.

   Cases cited: See, to the same effect, Supervisors *v.* Kennicott, 94 U. S., 498, and cases there cited. But see, *contra*, in a suit at law, Bynum *v.* Apperson, 9 Heis., 633; and in a suit in equity, McDonald *v.* Perkins, December term, 1877, at Nashville.

4. Case in judgment. A part of the Tenth Civil District of Davidson County having been added to the city of Nashville, under an Act of the Legislature requiring a preliminary vote of the people of the annexed territory, a bill was filed by about sixty of the citizens thus incorporated, attacking the validity of the proceedings, because of irregularities in the preliminary election; a demurrer to this bill was sustained by the Chancellor, but, on appeal, overruled by the Supreme Court, and the cause

remanded, with leave to the complainants to file an amended bill; the bill as amended was answered, proof taken, and, on the final hearing, the Chancellor, *mero motu*, dismissed the bill, because it showed on its face that the incorporation had been completed before the bill was filed, and because the Legislature had legislatively recognized the incorporation before the filing of the bill.

*Held*, that inasmuch as the amended bill only stated more fully the facts of the original bill without changing its substance, and as the former decree of the Supreme Court necessarily determined that there was equity on the face of the bill, the dismissal was erroneous, and *this* although the points on which the Chancellor based his decision were not brought to the attention of the Supreme Court on the first hearing.

FROM DAVIDSON.

Appeal from the Chancery Court. DAVID CAMPBELL, Chancellor.

GUILD, SMITH & GUILD and HAYWOOD & SYMMES for McNairy *et al.*

JOHN LELLYETT for the Mayor and City Council of Nashville.

MCFARLAND, J., delivered the opinion of the Court.

The complainants (about sixty in number) filed the original bill in this cause on the 10th of October, 1866. They charge, in substance, that they are residents and property-holders in a portion of the Tenth Civil District of Davidson County, lying near the city of Nashville. That the Mayor and City Council are attempting illegally to extend the laws and authority of the corporation over the territory in which they reside, by levying and col-

lecting taxes, and otherwise; that this authority is claimed by the city authorities, under a law of the State, passed on the 23d of March, 1860, which provides that territory adjoining the city may be included within the corporate limits, in the following manner: Twelve freeholders in the territory proposed to be included, shall sign a petition to the Mayor and City Council, setting forth by metes and bounds the territory proposed to be added. If the Mayor and City Council and a majority of the citizens who are freeholders consent, the territory shall become a part of the city of Nashville. The Act provides that to test the sense of the citizens who are freeholders, an election shall be held at some convenient public place in the territory, at which each citizen of the territory who is a freeholder shall be a qualified voter. That the sheriff of the county shall hold the election, give twenty days' notice, appoint judges, clerks, return the result to the city authorities, and if a majority of the voters be in favor of the addition, then the territory shall become part of the city of Nashville.

The bill charges that a petition signed by some twelve citizens was presented under this law, asking that certain territory be added to the city limits, to constitute the Tenth Ward of the city. That a pretended election was held by the Sheriff on the 7th of April, 1866, and a return made by him, a copy of which is exhibited with the bill. That the return shows a majority of four in favor of annexation, and

upon this the city authorities proceeded at once to extend their authority over the territory. The bill charges that the election was irregular and void; that the polls were not opened until 11 o'clock; that between the hours of 9 and 11 o'clock a sufficient number of legal voters attended to vote against the annexation to have changed the result. They were informed by the judges, or some one of them, that there would be no election that day; that there was no one to hold the election, and that it would be postponed to some future day; that they retired and did not vote. The bill further charges that a sufficient number of legal votes were rejected to have changed the result; that the polls were closed before 4 o'clock, thereby excluding a sufficient number of legal voters to have changed the result. Many other grounds were assumed in the bill against the validity of the annexation, which we need not now notice.

This bill was presented to a Circuit Judge for a fiat for an injunction, which was refused; and the Chancellor also refused, upon the ground that he was precluded by the action of the Circuit Judge. The bill was filed, however, and the Chancellor sustained a demurrer taken by the defendants and dismissed the bill, and from this decree the complainants appealed, and the cause was heard by this Court at its December term, 1869, when the decree of the Chancellor was reversed, the demurrer overruled, and the cause remanded, with leave to defendants to an-

swer, and leave to complainants to file an amended bill, and an injunction was awarded, subject to the future action of the Chancellor, as in other cases.

After the cause was remanded, on the 7th of May, 1869, an amended bill was filed. An answer to both bills was filed, embracing a demurrer to the amended bill.

A motion was made before the Special Chancellor presiding, to dissolve the injunction, and thereupon, of his own motion, he dismissed both bills, and the complainants have again appealed to this Court.

The bills were dismissed upon the ground that it appeared from their faces that no relief could in any event be granted. The reasons leading the Chancellor to this result were mainly, that it appeared that the annexation of the Tenth Ward was fully accomplished and the organization fully completed before the bill was filed, and the Court has no jurisdiction to disorganize any ward of the city; and secondly, that after the election in question an Act was passed on the 24th of May, 1866, by the Legislature of the State, in which the Tenth Ward is fully recognized as part of the city. The cause was not heard upon the answer and proof, but the action of the Chancellor was predicated alone upon the face of the bill. We have, therefore, not looked either to the answer or proof in the Record.

Many interesting questions raised by the bill have been argued with learning and ability. We are met, however, at the threshold of the case with a question

that must be disposed of, before the other questions can be reached, and that is, as to the effect of the former decree of this Court.

For the complainant it is argued that this decree adjudges the very questions upon which the Chancellor afterwards dismissed the bill, and the matters thus adjudged could not be re-examined by the Chancellor, nor can they now be examined by this Court. It is not denied that this is the result, provided the former decree of this Court is to be taken as an adjudication of the questions involved; but it is argued that this decree does not adjudge the questions decided by the Special Chancellor: 1st. Because the decree was confined alone to the questions raised by the demurrer, and did not preclude the Chancellor from afterwards dismissing the bill of his own motion, upon other questions not raised by the demurrer; and, 2d. Because the decree of a Court of Chancery, overruling a demurrer, decides nothing except that the defendant must answer; that the Court is not thereby precluded from again examining the bill upon the points raised by the demurrer; that in this respect it differs from a demurrer at law. We will examine the last proposition first.

It was held by Lord Hardwick, in *Dormer* v. *Fortescue*, 2 Atkins, 284, that after the demurrer was overruled the defendant might insist upon the same matter in his answer; and in *Avery* v. *Holland*, 2 Tenn., 71, this Court held in substance the same. The effect of legislation subsequent to this decision

has somewhat changed the reasons upon which this holding is predicated. All demurrers for form have been abolished, and demurrers must state the objection relied upon, or in other words must be special. Code, § 2934; *Kirkman & Ellis* v. *Snodgrass*, 3 Head, 370. Objections to the jurisdiction of the Court must be taken by plea or demurrer, and a filing of answer is a waiver of the jurisdiction of the Court, and the cause shall not be dismissed, but heard upon its merits, although the Court may be of opinion that the matters complained of are of legal cognizance. Code, § 4318, 4319; 3 Head, 372.

Appeals may, in the discretion of the Chancellor, be allowed from decrees settling principles and ordering an account, or upon overruling a demurrer. Code, § 3157.

The general object and tendency of these laws are to have all preliminary questions adjudged in advance, and not leave parties to incur the expense and delay of preparing a cause for trial, to be informed in the end that they are in the wrong Court, or that the trouble and expense of proving the facts of their case was unnecessary, for the reason that they were not in any event entitled to relief. If it be that the facts stated in a bill taken to be true do not entitle the complainants to any relief, it would certainly be better to decide this at once, and save the trouble and expense of a contest over facts that the Courts regard as wholly immaterial. A demurrer is

the proper mode to have such questions adjudged, and the object of a special demurrer is to call the attention of the Court to the direct question to be decided. A decree overruling a demurrer probably may not adjudge questions not raised by the demurrer, but which might have been good ground. But the converse of this seems to follow, that the decree does adjudge those questions directly raised by the demurrer.

The object of allowing an appeal from a decree overruling a demurrer is that the Supreme Court may determine in advance the questions thus raised, but if its decree adjudges nothing unless the demurrer be sustained, it would be of little practical advantage to allow the appeal. The decision would amount to nothing unless the decision be for the defendant and the bill be dismissed.

The question came before this Court at the April term, 1871, at Jackson, in the case of *C. R. Jamison, adm'r*, v. *James McCoy*. A negro man by the name of Cæsar had purchased his own and his wife's freedom from their owner (one Ward), but the consent of the State had not been obtained to their formal manumission under the laws passed upon that subject. At the request of Cæsar, a bill of sale was made conveying him to one Warren, as trustee or guardian. McCoy afterwards induced Cæsar to have the bill of sale made to him, which was done under many promises made by McCoy. McCoy, in fraud

of Cæsar's rights, reduced him and his wife to a state of slavery and sold them both to one Vaughan for $500, by whom they were sold to other parties, and afterwards to Jamison, in Mississippi, who held them for a time, but becoming satisfied at the truth of their statements, set them at liberty. After the death of Cæsar and his wife, Jamison took out letters of administration upon the estate of Cæsar, in Dyer County, and filed the bill against McCoy, to hold him responsible for the property of Cæsar, taken by him, for the $500 for which he and his wife were sold to Vaughan, and for the value of their services. McCoy filed a demurrer upon the following grounds:

1. The bill did not show that the County Court of Dyer County had jurisdiction to grant letters of administration upon Cæsar's estate.

2. The bill shows that Cæsar bought his freedom of Ward (his former owner), and this contract was in violation of law and void.

3. It seeks to recover his wages and asks the price which they sold for, which could not be allowed —his purchase did not invest him with freedom or enable him to maintain an action. The Chancellor overruled the demurrer, but allowed an appeal. The cause was heard by this Court at the Special Term, 1868, and the decree of the Chancellor overruling affirmed, and the cause remanded for plea or answer. The bill was answered, an account taken, exceptions taken and acted upon, and a decree for complainant

for about $2,000, including the $500 (the price of Cæsar and his wife), their hire and the value of his property. McCoy again appealed.

The exceptions were that Cæsar was a slave, and could not hold property; that the action was barred by the Statute of Limitations, and that the $500 for which he and his wife sold should not be allowed.

Judge Nicholson, delivering the opinion of the Court, said: "The first question raised in the argument is, whether the judgment of this Court at its April term, 1868, overruling the defendant's demurrer and remanding the cause for plea or answer, is conclusive upon this Court as to the matters adjudged by that decree. The answer to this question depends upon the settlement of another question, whether the decree at the April term was an interlocutory or final decree. In general an appeal to this Court lies only from final judgments or decrees, but by special statute several exceptions to this rule are provided for, and among them is discretion given to Chancellors to allow appeals from decrees overruling demurrers. The object of this exception to the general rule is obvious. It is intended to save parties the trouble and expense of going through a long course of litigation before having it finally determined whether upon the face of the bill the Court has the jurisdiction to grant the relief prayed for.

The sole object, therefore, of such an appeal is to obtain the final adjudication of the questions raised

by the demurrer. If the decree in such case be not final, then nothing is accomplished by the appeal. We hold, therefore, that the decree rendered by this Court at its April term, 1868, was final and conclusive as to the matters passed upon, and that it is as binding upon this Court as it was on the Chancery Court. All the legitimate consequences of the doctrine of *res adjudicata* belong to that decree."

The only distinction between that case and the present upon this question is, that in that case the Chancellor had in the first instance overruled the demurrer, while in this case the Chancellor sustained the demurrer, but this certainly can not change the principle.

It was held in that case that the decree overruling the point raised by the demurrer, that the bill did not show that the County Court of Dyer had jurisdiction to grant letters of administration, necessarily decided that Cæsar could hold property, for without this there could have been no administration. In support of this decision Judge Nicholson cites *Dewey* v. *Gray*, from the Supreme Court of California, Cooley's Constitutional Limitations, 47. It was held in that case that the question as to the complainant's rights to recover the $500 for which Cæsar and his wife sold was conclusively adjudged by the decree overruling the demurrer.

We are content to follow this case, and hold that the decree of this Court at the December term, 1869, in the present case, is conclusive as to all matters

adjudged by that decree. And we now proceed to inquire what matters were raised by the demurrer and adjudged by that decree.

We do not deem it necessary to set forth more fully than we have done the allegations of the bill. The cause of demurrer, among other things, is: "That the said complainants have not by their said bill made out such a case as entitles them in a Court of Equity to any relief as against these defendants as to the matters contained in said bill, or any such matters, and for more specific causes shows:

1. That the consent of the complainants was not necessary to be obtained to incorporate the territory, and their rights were therefore not infringed.

2. That the law referred to in the bill is a constitutional law.

3. That the proceedings had, as set forth by the bill, under the law as therein set forth, were all regular, lawful and valid, fully complying with the conditions of the law, and the territory in question thereby became a part of the city.

4. That the Act of 1860 was not special; that the Legislature had the power to make the addition without the consent of complainants.

5. That the bill shows that a majority of the voters were not opposed to the annexation; and

6. That the remedy was at law.

The decree of this Court in overruling this demurrer sets forth in brief the allegations of the bill in regard to the election, overrules the demurrer and

remands the cause for answer, and at the same time awards an injunction.

What does this decree adjudge? Did it preclude the Chancellor from dismissing the bill of his own motion for want of equity upon its face. If the amended bill, taken as part of the original bill, should present a different case, a different state of facts, then the Chancellor could take action upon the new cases; but the amended bill does but little more than present the irregularities of the election more in detail. It does not change the complainants' case, so far as it went in the original bill, it makes additional questions upon the irregularity of the election. Were the questions upon which the Special Chancellor acted, or which have been urged in argument here in support of his action, adjudged by the decree in question?

1. It is argued that the Chancellor's action should be sustained upon the grounds that the territory in question had become part of the corporation of Nashville, and organized as such before the bill was filed, and that after this no relief could be granted.

That the Court's attention was not called to this by the demurrer upon which the former decree was rendered. The fact that the territory had been organized as a ward of the city distinctly appears by the allegations of the original bill. The demurrer does not set forth this precise argument, but it does distinctly make the question that by virtue of these proceedings, under the law, the territory had become

part of the city. It is not necessary to show that the Court's attention was called to every argument or authority that might be used for or against a given conclusion, to make their decision an adjudication of the question.

2. It is argued that the Chancellor's action is correct, upon the grounds that whatever be the effect of the proceedings set forth in the bill in regard to the election, yet the territory is recognized as part of the city by the Act of May, 1866, before referred to. This Act was passed before the filing of the bill, and the decree of this Court and its effect was necessarily determined by the decree in question. The attention of the Court may never, in point of fact, have been called to the fact. This Court may make adjudications entirely overlooking statutes or decisions governing the case, and while the decision may not be good authority in another case, nevertheless for that case they are adjudications, and must have full effect as such.

The demurrer makes the direct question that the Legislature had the power to add the territory to the city limits without the consent of the complainants. Whether the Legislature had done so or not was necessarily involved in this.

Again, it is argued that no provision is made for contesting the election; that the returns of the sheriff is conclusive; that the remedy was not with the Courts, but with the Legislature; that the complainants have not the right to maintain this bill; that

this relief could only be granted at the instance of the State.

We are of opinion that the decree of this Court before referred to, necessarily adjudges that assuming the facts stated in the original bill to be true, under the law in force and applicable to the case, that the city authorities of Nashville had no right to enforce their municipal authority and laws over the territory in question, and that the complainants, in the present form of action, are entitled to have relief by injunction against the Mayor and City Council. We are unable to give any other construction to the decree consistent with what we regard as sound principle. This being so, the decree of the Chancellor was erroneous.

We express no opinion upon the other questions argued. We think that for this case at least they are *res adjudicata*, and therefore have not examined them.

As to the consequences and inconveniences that may result either way from this decree, we have nothing to do. We must simply declare the law as we understand it.

The decree must be reversed and the cause remanded.

## CALDWELL, CUMMINGS & CO. *v.* S. M. MCELROY.

1. ACCOUNT. *From another county. Set off to. Oath. Partnership.* In a suit upon a sworn account from another county, not denied under oath, for freight and charges on goods shipped, a surviving partner may plead by way of set-off to such account a partial loss of the *identical* goods.

Code, § 2918.

FROM LINCOLN.

Appeal from the Circuit Court. WM. P. HICKERSON, Judge.

CALDWELL & WARDER for Coldwell, Cummings & Co.

BOYLES & BURNAM for McElroy *et al.*

SNEED, J., delivered the opinion of the Court.

The plaintiffs were commission merchants in the town of Shelbyville, and the defendant is the surviving partner of the firm of McElroy, McKinney & Miller, late merchants and druggists in the town of Fayetteville. The plaintiffs brought this action against McElroy & McKinney in 1861, as the surviving partners of the late firm of McElroy, McKinney & Miller, upon an account verified under the Statute as an account coming from another county, the plaintiffs residing in the County of Bedford, and the defendants in the County of Lincoln, where the action was

brought. The justice of the account was not disputed under oath, but the defendants relied upon the defence of set-off. The account is for freights advanced and shipment charges upon divers merchandize received by the plaintiffs for defendants at Shelbyville, and forwarded to defendants at Fayetteville.

The motion of set-off relied on is, the value of certain goods thus alleged to have been shipped, and which were never received by the defendants. The value of the goods thus lost is shown to be largely in excess of the plaintiffs' demand, and upon two trials the verdict gave the plaintiff the amount of his account, but allowed the set-off, and upon the last trial judgment was rendered accordingly, from which the plaintiffs have appealed in error.

It is insisted that the loss of the goods is not legitimate matter of set-off. The lost goods were spirituous liquors, in barrels, of a determinate and ascertained quantity and value, and the quantity and value thereof is clearly established by the proof.

If the plaintiffs contracted for the shipment of goods to the defendant, of which the lost goods were a portion, and brings his action for freight and charges upon the whole, there can be no question that the loss of part of the goods is matter arising out of the plaintiffs' demand, and for which the defendant would be entitled to recover in a cross-action, in the sense of the Statute. 2 Thomp. & Steg. Stat., § 2918. And we think it is equally clear that the surviving partner under the facts of this

case has the same right to avail himself of this matter of set-off that the firm would have had. The only difficulty we have in the case is upon the proof. The evidence does not very clearly identify the particular goods alleged to have been lost as having come into the possession of the plaintiffs, and the proof on their part is very positive that all the goods ever received during the years in which the account sued on accrued were duly and promptly forwarded in wagons, the usual mode of transportation, and as instructed by the defendants, to them at Fayetteville.

In this condition of the proof, we think the verdict is not sustained. The judgment must therefore be reversed and a new trial awarded, in which these matters may be rendered more clear.

A. J. Ballentine, Executor, etc., *v.* Isabella Spear *et al.*

## A. J. BALLENTINE, Executor, etc., *v.* ISABELLA SPEAR *et al.*

1. WILLS. *Construction of. An estate in remainder can not be charged. When.* A party who holds a life estate can not charge the estate in remainder unless he be possessed of the absolute power of disposition.

   Cases cited: Smith *v.* Bell, M. & Y., 302; Pillow *v.* Ray and Wife, 1 Swan, 185; Silver *v* Brown, 2 Swan, 116; Williams *v.* Johnson, 2 Swan, 624; Dean *v.* Myers, *et al.*, 1 Cold., 228.

2. SAME. *Same. Personal property.* The interest of remaindermen in personal property, which is consumed by use, is limited to such as is left at the death of the tenant for life.

   Cases cited: Forsey *v.* Luton, 2 Head, 184; Vancil *v.* Evans, 4 Cold., 340.

3. SAME. *Same. Permanent improvements.* Permanent improvements, such as necessary repairs, etc., will be charged to the tenant for life, when made during the life estate.

FROM GILES.

Appeal from the Chancery Court. JNO. C. WALKER, Chancellor.

T. M. JONES & SONS for Ballentine.

BROWN & MCCOLLUM for Isabella Spear.

JOHN A. TINNON for Minor Defendants.

MCFARLAND, J., delivered the opinion of the Court.

This bill was filed to obtain a construction of the

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will of George Spear, who died about September, 1858.

After providing for the payment of debts, the will is as follows: "In the second place, I give and devise to my beloved mother, Isabella Spear, for and during her natural life, all the residue of my property, of every kind and description, both real and personal, consisting of the house and lot where I now live, in or near Pulaski, in said county, adjoining the land or lots of F. H. Wilkerson, James Fulsom and others; my negro woman, Harriet, and her two children, Charlie and Hunter; household and kitchen furniture, and my notes, accounts and demands, to have and to hold and to use the same for her comfortable support during her natural life, and for the comfortable support of my beloved sister, Isabella, while she remains single and with my mother. And in the third place, at the death of my mother, whose life may a kind Providence prolong and protect, I wish, desire and direct my executor to sell and dispose of all of said property, both real and personal, which may remain, at private or public sale, as may be best, and collect and divide the whole of the proceeds thereof into three equal shares. One share to my beloved sister Isabella, now living with me and my mother; one share to the children of my deceased sister, Margaret, wife of Thomas S. Riddle, and one share to the children of my deceased sister, Mary Ann, wife of Syrenius D. Tinnon, absolutely and for ever."

This is all, except the appointment of an executor.

The mother of the testator remained in possession of the estate, with the sister Isabella, who lived with her, until the death of the former, in June, 1868.

The executor thereupon sold the house and lot specified in the will, and some vacant lots, and the small amount of personalty that remained, this being the whole of the estate.

The house and lot was purchased by Isabella Spear for $2,600; the unimproved lots sold for $300. The remaining personalty sold for about $100.

The bill shows that Isabella Spear sets up a claim as an off-set against her notes for the purchase of the house and lot.

The substance of the claim is, that the estate left by the will, that is, a life estate in the property, was insufficient for the support of herself and mother, after the payment of the debts, and said Isabella was compelled to expend, for the support of herself and mother, a considerable sum, the proceeds of her own industry; and also that she paid out a sum for repairs, in permanent improvements upon the premises, all of which she claims should be allowed her, and deducted from the notes for the house and lot.

The Chancellor was of opinion that the leading object of the will was to provide a support for the mother and sister of testator, and the life estate proving insufficient for this purpose, the entire body of the estate was chargeable with this support, and the daughter, Isabella, having been compelled, from her

own means, to make up the deficit, and pay what the life estate in the testator's property lacked of furnishing the support, that she was entitled to be repaid the sums thus advanced by her.

An account was ordered, from which it was ascertained that said Isabella had expended $184.95, for permanent improvements or repairs, and that for the support of herself and mother she had expended, with interest, $2,138.57, the two sums making $2,325.52. For this sum she was allowed a credit upon the aforesaid notes.

From this decree the parties representing the children of the two deceased sisters, who are entitled to a share each of the remainder, have appealed.

The claim of Miss Isabella is presented with much earnestness. It may possess much merit, in a general way, but we have not been able to find any ground upon which the Chancellor's decree can stand, consistent with sound legal principles.

It is certainly true, that in the construction of wills, the intention of the testator is to prevail; but that intention must be gathered from the language used. That the testator's mother was only to take a life estate in the property, is as clearly expressed as the language can express it. It is true, the will further says, she is "to have and to hold and to use the same for her comfortable support during her natural life, and for the comfortable support of my beloved sister, Isabella, while she shall remain single and with my mother." But this surely can not

change the positive limitation to a life estate in the first instance, and the devise of the remainder over. It is but an expression of the purpose for which the devise was made, the amount devised being, in the opinion of the testator, sufficient for the comfortable support of the mother and sister.

It is well settled that where a devise or bequest of a life estate, with remainder over, is followed by an absolute power of disposition in the first taker, that such power of disposition being inconsistent with the devise over, that the first taker will take the absolute estate. *Smith* v. *Bell*, Martin & Y., 302; 1 Swan, 185; 2 Swan, 116, 624; 1 Cold., 228.

But nothing short of an absolute power of disposition will defeat or change the devise of the remainder over.

This will contains no power of distribution. The language is, "to have and to hold and to use the same for her support," etc., and if it did, the result would be to give the estate absolutely to the mother, and Isabella's claim would be against her estate; but we hold that the mother took only a life estate.

As to the personalty that would be consumed by the use, the interest of the remainder-men would be limited to that which was left at the death of the tenant for life. See *Forsey* v. *Luton*, 2 Head, 184; *Vancil* v. *Evans*, 4 Cold., 340.

The estate of the testator's mother being clearly limited to a life estate, she could not, nor could the

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daughter charge this property beyond the termination of her life.

The substance of the argument for Isabella is, that the provisions of the will having been intended for the support of her mother and herself, and proving insufficient for that purpose, she was compelled, in part, to support herself and mother also, and therefore she can charge her brother's estate, not only with the amount paid for her mother's support, but for the amount expended for her own support; that her brother having undertaken by his will to support her, ought to have done so.

We do not assent to the correctness of this view. As to the amount claimed for permanent improvements, this seems to have been for necessary repairs, such as a roof and fencing. This, as a general rule, is chargeable to the tenant for life, when made during the life estate.

The decree must be reversed, and the above mentioned credits upon the sale notes disallowed. The costs will be paid out of the funds.

## THOMAS W. BUCHANAN *v.* S. H. KIMES *et al.*

1. LIEN of JUDEMENT. *Priority of.* The lien created by a registered judgment has priority over an unrecorded contract.

   Code, §§ 2030, 2075; Kinsey *v.* McDerman, 5 Cold., 392.

2. GUARDIAN. *Action, as such, does not affect his individual rights. When.* Where the guardian of minors is made defendant, as such, to a suit involving the title to property, he is not such a party as will render the decree binding on him in an individual suit. While this would be notice of his ward's claim upon the land, his rights will not be effected thereby since a creditor may enforce his judgment lien, the adverse title not being registered.

   Cases cited: Johnson & Heam *v.* Morgan, Allison & Co., 2 Hum., 115; Stanley *v.* Nelson, 4 Hum., 484; Butler *v.* Maury, 10 Hum., 420.

3. SAME. *Deed. Recitals in. Estoppel.* While the recital in a vendor's deed might estop him from denying the purchase of his vendee, yet it can have no effect in communicating a title as against his judgment creditors.

4. SAME. *Trust deed. Rights of beneficiaries.* Where land is conveyed in trust to secure certain specific debts, the beneficiaries of such trust deed will have a lien on the land so conveyed superior to that of ordinary judgment creditors.

FROM LINCOLN.

Appeal from the Chancery Court. JOHN P. STEELE, Chancellor.

WOODS & DISMUKES, H. L. DAVIDSON and E. COOPER, for Buchanan.

BRIGHT & BRIGHT and EDWARD H. EAST for Kimes *et al.*

Thomas W. Buchanan *v.* S. H. Kimes *et al.*

SNEED, J., delivered the opinion of the Court.

In 1855 S. H. Kimes purchased a tract of land of 270 acres at Chancery sale, which was reported to the Court and confirmed, but there was no divestiture or vestiture of title in him. He has paid all the purchase money except between $300 and $400. About the same time S. H. Kimes purchased six acres adjoining the 270 acres, and paid the purchase money, except $75, but got no legal title.

The bill in this case was filed to subject S. H. Kimes' equitable interest in these two tracts, to the satisfaction of a judgment obtained by T. W. Buchanan against S. H. Kimes for about $2,100, which judgment was properly registered, after the issuance of execution and return of "*nulla bona.*" The claim of complainant to satisfaction of his judgment is insisted on several grounds.

1. It is insisted that in 1861 S. H. Kimes made a contract of partnership with Thomas B. Kimes, in which he agreed to convey to said Thomas B. Kimes one-half of said 270 acres, whenever he obtained the legal title from the Chancery Court. Without considering the question whether the contract is so proven, as to make it evidence in the case, it is enough for the present, that the contract was never registered, and therefore, can not stand in the way of complainant's judgment and the lien created by its registration. Code, §§ 2030, 2075.

2. It is next insisted that complainant is estopped by the fact that he was a party defendant to a bill

filed in 1866 by the heirs and administrator of T. B. Kimes, in which the Court decreed a sale of one-half of the 270 acres as the property of Thomas B. Kimes, for distribution among his heirs. Upon looking to the proceedings in that case, it appears that complainant owes the guardian of two of the minor heirs of T. B. Kimes, and as such answered the bill *pro forma*, but expressly referred the interests of his wards to the Court. He made no admissions as to the title of the property, but was simply a defendant as the guardian of the two minors. He had no interest personally in the suit nor does it appear that he was then a creditor of S. H. Kimes. He was, therefore, not such a party to the suit, as would render the decree in the case in any way binding on him. The most that could be inferred would be that he had notice in that suit; that the heirs of T. B. Kimes claimed an interest in the 270 acres of land, but notice does not affect the right of a creditor to enforce his judgment and lien, when the adverse title is not registered. Code, §§ 2030, 2075; 2 Hum., 115; 4 Hum., 484; 10 Hum., 420; 5 Cold., 392.

3. It is further insisted that S. H. Kimes, on the 6th of February, 1866, conveyed one-half of the 270 acres to 'Squire Pickle, in trust to secure specified debts; and that in this conveyance it is recited that he had previously sold the other half of the 270 acres, to T. B. Kimes. This conveyance was registered in February, 1866. The recital in describ-

ing the land conveyed might operate to estop S. H. Kimes from denying that T. B. Kimes had bought the land, but it can have no effect in communicating a title as against his judgment creditors. The deed of trust, however, gave to the beneficiaries therein a superior lien on the half of the land conveyed for their benefit, and complainant could only reach any surplus that might remain after satisfying such of the debts as might be shown to be valid and subsisting debts.

The Chancellor held that the deed of trust was void for want of sufficient stamps, and he gave complainant a decree for the satisfaction of his judgment against both entire tracts of land, after the payment of the balance of the purchase money.

The decree will be so modified as to subject the one-half of the 270 acres claimed by T. B. Kimes, and the six acres to the satisfaction of complainant's judgment; and as to the other half, he will be entitled to any surplus after the trust deed shall be foreclosed, and the valid subsisting debts satisfied. And the cause is remanded for further proceedings. The costs of this Court will be paid equally by the appellants and appellee, and the costs below as ordered by the Chancellor.

Wm. Simonton *v.* W. J. Buchanan.

## Wm. Simonton *v.* W. J. Buchanan.

1. New trial. *Affidavit. Counsel's miscalculation as to time and business.* Where a party and his counsel miscalculate as to the condition of the docket of the Court, and are consequently not present at the trial of the suit, a new trial will not be granted on affidavit of this fact.
2. Same. *Pleading and Practice. Informalities. Remedy.* Parties will not be allowed, after verdict, to complain of informalities which might have been remedied, if objected to in due time, especially under the circumstances of this case.

FROM LAWRENCE.

Appeal from the Circuit Court. A. M. Hughes, Judge.

Brown & McCollum for Simonton.

W. F. Cooper and Horace H. Harrison for Buchanan.

Buchanan sued Simonton in the Circuit Court of Lawrenceburg upon a note for $3,500, and had verdict and judgment in his favor, from which, upon the overruling of his motion for a new trial, Simonton appealed to this Court.

He now insists that the Circuit Judge erred in overruling his motion for a new trial. In support of the motion, Simonton's affidavit, and that of one of his counsel was read, setting forth that the verdict and judgment were had on the third day of the

term, and before either had arrived at the Court-house. They seek to excuse their absence from Court upon the ground that the counsel was confident, from his knowledge of the docket and business of the Court that the cause would not be reached during that early period of the term, and they were both surprised, on reaching the Court-house on the fourth day of the term, to find that the case had been submitted to a jury and judgment rendered on the day before.

Simonton states that his pleas were true, and he could have made proof of their truth, etc.

This Court can not grant a new trial for the reasons stated in the affidavit. The Record shows that the attorney of Simonton said he could produce other affidavits, while reading those filed, and after his motion was disposed of, but did not offer any, or otherwise show what he proposed to show by them, other than or different from the facts set out in the affidavits read.

If the Court below had chosen to give a new trial for the reasons stated in the affidavits, we would have esteemed it a liberal exercise of his discretion. But in this Court his refusal can not be regarded as an abuse of such discretion, so as to call for the interposition of this Court.

Four pleas were pleaded—the last setting out that $247.60 of the $3,500 was usurious interest. All the pleas were sworn to in one affidavit at the end of the last plea.

Replications to the first, second and third pleas were filed, and further replication to the third plea, but which was perhaps intended to apply to the fourth, denying any unlawful or usurious interest, as alleged, signed and sworn to by attorney for the plaintiff.

Upon these pleas a mis-trial was had several times before the term at which the verdict and judgment complained of were rendered. No exceptions seem to have been taken to the pleas because not properly sworn to, nor for any other defect. And the parties will not be allowed, after verdict, to complain of informalities which might have been remedied if objected to in due time, especially where the cause has been tried, as if the pleadings were regular, as seems from the charge to have been done in this case.

We do not think there is any error in the Record for which we should reverse.

Affirm the judgment.

## S. S. Alexander *et al.* v. Colcock, McCauley & Molloy.

Redemption. *Removal of cloud from title. Chancery jurisdiction.* A Court of Chancery has no such jurisdiction as can entertain a bill which seeks to keep a question of redemption open, until a judgment of the Court can be had removing all embarrassments and clouds from the title of property held for redemption.

FROM LINCOLN.

Appeal from the Chancery Court. A. S. Marks, Chancellor.

Bright & Son for Alexander *et al.*

Cabiness & Cooper for Colcock, McCauley & Molloy.

Burton, Special J., delivered the opinion of the Court.

The complainants, some of them being creditors and others sureties, or accommodation endorsers, of one C. E. Smith, filed their several bills against him and his brother (H. H. Smith), in the latter part of 1860, seeking to attach the property of their said principals, and have it subjected to the satisfaction of his several debts, on which they were liable, or that he owed them. The attachments were issued and

levied on the lands described in the pleading. The ground of the attachment was that said C. E. Smith had, or was about fraudulently to dispose of his property to his brother (H. H. Smith), to defeat his creditors. C. E. Smith, however, answered that the trade he had made with his brother had been cancelled. This litigation has been revived since the war against the heirs and personal representatives of both the Smiths, they having died in the meantime. In the last bill filed in May, 1869, complainants show that the defendants (Colcock, McCauley & Molloy), obtained in November, 1860, a judgment against said C. E. Smith and some of the present complainants; that in April, 1867, defendants caused an execution on their judgment to be levied on a tract of land of 188 acres, one of the tracts on which complainants had levied their attachments. The land was sold by the sheriff, and bought by the defendants (Colcock, McCauley & Molloy). They afterwards advanced their bid to the sum of $1,300, which sum they credited on their judgment. And the complainants say that they are informed and believe that Colcock, McCauley & Molloy intend to claim said land under their bid and purchase unless redeemed within the two years allowed by law, which two years expired on the day after complainants filed this bill.

Complainants say that they are advised that they can not safely redeem the land:

1. Because the fraudulent deed above referred to conveyed the legal title to H. H. Smith, and there-

fore the execution of Colcock, McCauley & Molloy did not reach it, and that it required the aid of a Court of Chancery to subject it and remove the cloud from the title.

2. Because their attachments created a prior lien to that of the execution. They insist that the title to the land is beclouded and embarrassed by these various matters, and come into a Court of Equity insisting that they "have the right of keeping the question of redemption open until they can have the judgment of the Court removing all embarrassments and clouds from the title." And they say further that they are willing to advance one hundred per cent. on the *bid* of Colcock, McCauley & Molloy, if the Court will first remove the cloud from the title to the 188 acres of land.

We are aware of no precedent for this bill. Courts have to decide upon the rights of parties as they exist, and have no jurisdiction that we know of to decide beforehand whether complainants would acquire a good title by the redemption of this land, or whether they would be buying land on which they already had the superior lien. The Chancellor seems to have taken this view of it. We concur with him and affirm his decree, dismissing the bill with costs.

Geo. B. Hibbard *v.* Martha E Newman, Executrix.

# Geo. B. Hibbard *v.* Martha E. Newman, Executrix.

Landlord and tenant. *Tenancy from year to year. What will constitute.* Where a tenant, upon the expiration of his lease for one year, refuses to give possession after notice, but holds over and complies with the conditions of the original contract in monthly payments, he becomes a tenant from year to year, and is liable for the entire year's rent, though the property be consumed by fire during his occupancy.

Case cited: Taylor on Landlord and Tenant, § 56.

## FROM DAVIDSON.

Appeal from the Circuit Court. Eugene Carey, Judge.

Lawrence, Peabody & Ruhm, G. P. Thruston and J. L. Fare for Hibbard.

J. T. Brown for Newman.

Sneed, J., delivered the opinion of the Court.

On the 1st of August, 1865, Martha Newman, executrix, rented and leased to Charles A. Irwin, Geo. B. Hibbard and J. K. James the Exchange Stables, in Nashville, for one year from that date, with the privilege of retaining the property for the term of five years, provided she should have the same control of the property as she then had. Irwin, Hibbard and James agreed to pay for the use of the property $175 per month. Under this con-

tract they entered into the possession of the property and paid rent therefor until July 27th, 1866. On that day the *lessor* notified the lessees that not having the same control of the property as when the contract was made, it would be impossible for the lease to continue longer than the 1st of August, 1866. At the termination of the lease for one year the lessees declined to give up the premises, but continued to occupy them, paying a monthly rent of $175, at the beginning of each month, until about the 1st of March, 1867, at which time the property was destroyed by fire. From that time the lessees refused to pay rent, and thereupon the lessor brought this suit to recover rent from the time of the burning of the property until the 1st of August, 1867.

The case was submitted to a jury under the charge of the Judge of the Circuit Court, when they found in favor of the lessor. The lessees have appealed to this Court.

The main ground upon which a reversal is sought is, that there is error in the following instructions given by the Judge to the jury, viz.: "That if defendants held over after the expiration of the first year they would be bound for the second year's rent —the *whole of it.* That to relieve them from this liability the defendants would have to prove that, in holding over to the second year, a new arrangement was entered into with the *landlord* for the second year. That it was a question for the jury to determine whether such new arrangement was entered into

by the parties as would relieve the defendants from their liability for the second year's rent."

We are to assume that these instructions were given with reference to the proof adduced before the Court and jury. Although it may be true as argued, that the notice given on the 27th of July, 1866, put an end to the lease for five years; and thereby the holding after the expiration of the first year constituted the lessees *tenants at will*, or at *sufferance* of the lessor; yet it appears by the proof, which is uncontradicted, that immediately after the expiration of the first year the lessees commenced paying rent to the lessor, according to the original contract, and continued so to do at the beginning of every month, until the property was consumed by fire. It is clear that the tenancy at will or sufferance was converted thereby into a tenancy from year to year. Taylor's Landlord and Tenant, Section 56.

In view of the uncontroverted facts, therefore, the Circuit Judge committed no error in telling the jury that if defendants held over after the expiration of the first year, they would be bound for the second year's rent.

The next proposition in the charge was manifestly made in view of the attempt by the defendants to prove a new arrangement, by which they were at liberty to surrender the property before the expiration of the second year; and also in view of their attempt to prove that they did surrender the property after the fire, and that the surrender was accepted by

the lessor. There was some conflict of evidence on these questions of fact, and the matter was properly left to the determination of the jury. They found that there was no such new arrangement, and no such surrender and acceptance of the premises, and we think their verdict is supported by the proof.

Upon the whole case we are satisfied that there is no material error in the charge of the Court, and that the jury have reached the merits of the case.

We therefore affirm the judgment.

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## Hiram Poole and Calvin J. Mahaffy *v.* The State.

1. Criminal Law. *Homicide. Murder. Indictment for at common law and under the Statute.* An indictment in the common law form is sufficient to embrace murder in the first degree.

   Code cited: Sections 4598–9.

2. Same. *Same. The words of the Statute must be employed. When.* The words "wilful," "deliberate," "malicious," and "premeditated," have an independent meaning which is a necessary ingredient of murder in the first degree, all of which must be present, leaving nothing to inference, or to be supplied by intendment. In *this* view a majority does not concur. Judge Turney dissenting.

   Cases cited: Dale *v.* The State, 10 Yerg., 552; Luster *v.* The State, 11 Hum., 169; Kirby *v.* The State, 7 Yerg., 264; Mitchell *v.* The State, 8 Yerg., 514.

3. Same. *Same. Evidence. Character. Cross-examination.* In the cross-examination of witnesses touching character, it is incom-

petent to prove that the witnesses "have heard" certain things or offenses charged to the accused. While it is true that a witness may estimate his own knowledge of the party whose character is in issue, he must do so in connection with his knowledge of his standing in the community in which he lives and did live at the time in which the inquiry may be made; to legalize testimony of character the witness must have heard a sufficient number of persons speak of the assailed to be able to express the well-founded opinion that he believes he knows what a majority would say if called on to speak. Even so when it is intended on cross-examination to assail character, the same rule obtains and the things or offenses offered to be proved must constitute a part of the general character.

4. SAME. *Same. Charge of Court.* The words defining the offense of murder in the first degree have a technical meaning, and it is the duty of the Court trying an indictment for the crime to give such meaning to the jury in the charge, and not merely to use the language. The jury is not presumed to understand it any more than it is presumed to understand any other technical term. While it is not abstract error to say to the jury, "before you can find the defendants guilty before the law, the testimony must be sufficient to exclude every other reasonable hypothesis but the guilt of the defendants." The Court should have explained that the proof must exclude the idea that the deceased might have come to his death in a manner inconsistent with the guilt of the accused; that if the facts generated in its minds a probability that the deceased came to his death by other means they should acquit. That the proof need not show that another was the guilty agent or other means the instrument, but that it would be sufficient if such tendency in the proof created a reasonable doubt of the guilt of the accused.

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FROM ROBERTSON.

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Appeal from the Circuit Court. JAMES E. RICE, Judge.

Hiram Poole and Calvin J. Mahaffy *v.* The State.

J. E. & A. E. GARNER for Poole and Mahaffy.

JAMES L. WATTS and J. B. HEISKELL, Attorney General, for the State.

TURNEY, J., delivered the opinion of the Court.

Murder, at common law, embraced murder in the first and murder in the second degrees, as defined in Sections 4598–9 of the Code, brought forward from the third section of the Act of 1829, ch. 23. The statutory distinction is not only founded in mercy and humanity, but is well fortified by reason. In my opinion, while an indictment at common law is also good under the statute, it is only good to support a conviction for murder in the second degree, unless it contain words of like significant import with those of the statute.

It is the defining words of the statute that make the offenses and the distinction between them, definitions and distinctions in the control of the Legislature—control it has exercised, and the Courts are bound by it.

It is too late, after the words of the Act have been so long, uniformly and plainly construed, to attempt to make any two of its words have the same meaning—a meaning of equally forcible import—so as to excuse or do away with the employment of one in an indictment for murder in the first degree.

Each of the words used has been defined by this Court in more than one case, and by that definition

each has a meaning comprehensive within itself not peculiar to either of the others.

The words are, "willful," "deliberate," "malicious," and "premeditated." We must presume that the Legislature intended (as this Court has held), that each word had its independent meaning, which was a necessary ingredient in the crime of murder in the first degree. While it has been holden that words of the same import will be sufficient, such holding has gone as far as construction and authority will allow, leaving it still the safer plan to employ the words of the law creating and defining the offense. Certainly we must not go to the extent of dropping one of the words, nor substituting another of a like import, and giving to another a meaning not only broad enough for itself, but also for its co-employee in language.

In *Dale* v. *The State*, 10 Yerger, 552, Judge Green says: "The killing must be done willfully—that is, of purpose with intent that the act by which the life of the party is taken should have the effect; deliberately—that is, with cool purpose; maliciously—that is, with malice aforethought; and with premeditation—that is, a design must be formed to kill before the act by which the death is produced is performed. In other words, proof must be adduced to satisfy the mind that the death of the party slain was the ultimate result which the concurring will, *deliberation* and *premeditation* of the party accused sought;" making a marked distinction and independ-

ence between the the terms "deliberation" and "premeditation," and excluding the idea of the substitution of the one for the other, or of tautology in their use.

In the case of *Luster* v. *The State*, (a case of robbery), 11 Hum., 169, Judge Totten says: "It may indeed be inferred from the averments contained in the indictment that the goods were taken from the person of the prosecutor and against his will, but in criminal prosecutions of the grade of felony, at least, nothing that goes to the substance of the offense should be left to intendment—it should be distinctly averred."

And so we say of the indictment in this case, it may be inferred that murder in the first degree was committed, but it is not distinctly averred. To infer is to supply by intendment.

In the cases of *Kirby* v. *The State*, 7 Yerger, 264, and of *Mitchell* v. *The State*, 8 Yerger, 514, Judge Green delivered the opinions, which left alone would seem to conflict with the ruling here, but as already seen, Judge Green delivered the opinion in *Dale* v. *The State*, in which he plainly announces the effect of an indictment at common law under our statute. I think his latter holding is more in accord with the intention of the Legislature.

In *Kirby's* case the indictment, after using the common law language, also uses the term, "murder in the first degree," as descriptive of the crime. This fact is noticed in the opinion as one of importance.

In the case before us there is no word or sentence charging a cool purpose, an indispensable ingredient in murder in the first degree. Willfulness, malice and premeditation may exist without that cool purpose contemplated by the statute as construed. In this view a majority of the Court does not concur, but adheres to the opinion that an indictment at common law is sufficient to embrace murder in the first degree.

In the cross-examination of witnesses touching character it is incompetent to prove that the witnesses "have heard" certain things or offenses charged to the accused. While it is true that a witness may estimate his own knowledge of the party whose character is in issue, he must do so in connexion with his knowledge of his standing in the community in which he lives and did live at the time in which the inquiry may be made, to legalize testimony of character the witness must have heard a sufficient number of persons speak of the assailed to be able to express the well-founded opinion that he believes he knows what a majority would say if called on to speak. Even so, when it is intended on cross-examination to assail character, the same rule obtains and the things or offenses offered to be proved must constitute a part of general character. To relax the rule would make it quite easy for malicious persons to say things one hour, and the next to prove by the witness called to sustain character that he had heard them.

The words defining the offense of murder in the

first degree have a technical meaning, and it is the duty of the Court trying an indictment for the crime to give such meaning to the jury in the charge, and not merely to use the language. The jury is not presumed to understand it any more than it is to understand any other technical term. The fact that there is a difference in the technical and literal meanings makes it the more important and imperative that they be explained.

It is also the duty of the Court to define in his charge all the offenses embraced in an indictment for this crime. The jury is the exclusive judge of the facts, the Court is a witness to it of the law. When the jury has heard the facts, it is for it to say what offense, if any, has been committed against the law. However plain it may be to the mind of the Court that one certain offense has been committed and none other, he must not confine himself in his charge to that offense. When he does so he invades the province of the jury, whose peculiar duty it is to ascertain the grade of offense. However clear it may be, the Court should never decide the facts, but must leave them unembarrassed to the jury.

The rule that a Court is only required to charge as to such questions as are made by the facts, means simply that if legal questions present themselves by the facts, and which are claimed, either to sustain or refute the charges in the indictment, then it is the duty of the Court to charge upon such questions, but if questions not so raised are urged, it is not

the duty of the Court to charge touching them. It was never meant that the Court should be excused from defining the offenses averred or embraced in the indictment.

While it is not abstract error to say to the jury, "before you can find the defendants guilty before the law, the testimony must be sufficient to exclude every other reasonable hypothesis but the guilt of the defendants." The Court should have explained that the proof must exclude the idea that the deceased might have come to his death in a manner inconsistent with the guilt of the accused; that if the facts generated in its minds a probability that the deceased came to his death by other means they should acquit. That the proof need not show that another was the guilty agent or other means the instrument, but that it would be sufficient if such tendency in the proof created a reasonable doubt of the guilt of the accused.

Reverse the judgment and remand the cause.

## THE MAYOR AND CITY COUNCIL OF NASHVILLE and THE FOURTH NATIONAL BANK *v.* THE POTOMAC INSURANCE COMPANY.

1. BONDS. *Coupons on city bonds. Profert of bonds.* In a suit upon a coupon, profert of the bonds, the stipulations of which being set forth in the declaration, is not necessary.

   See Mayor, etc., of Nashville *v.* The First National Bank, 1 Baxter, 402.

2. SAME. *Same. Demand and protest. Not necessary.* To maintain a suit upon coupons demand and protest is not necessary, though they be in the form of orders. They circulate as independent securities.

   See Mayor, etc., of Nasville *v.* The First National Bank, 1 Baxter, 402.

3. SAME. *Same. Liability of City. When.* The City will be liable in a suit upon the coupons, though they show no promise or undertaking on the part of the Mayor and City council, since the Mayor and City council are bound for the payment by the terms of the bonds.

4. GARNISHMENT. *Answer of garnishee conclusive. When.* Where the amount exceeds $50, the answer of the garnishee at law is conclusive.

   Cases cited: Moore *v.* Green, 4 Hum., 299; Drane *v.* McGavock, 7 Hum., 132; Moses *v.* McMullen, 4 Cold., 242; Foster *v.* Saffeff, 1 Swan, 90; Conner *v.* Allen, 3 Head, 418.

5. SAME. *Same. Liability of garnishee.* The liability of the garnishee is to be arrived at, not by surmises and inferences, but by direct admissions and conclusions following necessarily therefrom.

   Case cited: Moses *v.* McMullen, 4 Cold., 245.

   SAME. *Same. Pleading and Practice. Doubt as to garnishee's indebtedness.* Where it is doubtful whether the garnishee owes the debtor, the question must be solved in the garnishee's favor, but in proceedings by attachment or garnishment bill in Chancery, the same may be contested by proof.

   Case cited: McCrae *v.* Bank of Tennessee and Vance, 6 Cold., 474.

7. SAME. *Same. Garnishee not liable to judgment. When.* If the

garnishee owes the debtor, but the debtor owes him a larger sum, the garnishee will not be liable to a judgment upon these facts.

Cases cited: Arledge *v.* White, 1 Head, 241; Fay *v.* Reager, 2 Sneed, 200; Johnson *v.* Hoyle, 3 Head, 56; Fain *v.* Jones, 3 Head, 308.

## FROM DAVIDSON.

Appeal from the Circuit Court. NATHANIEL BAXTER, Judge.

JOHN LELLYETT for the Bank.

GUILD & SMITH for the Company.

MCFARLAND, J., delivered the opinion of the Court.

This action was brought by the Potomac Insurance Company, against the Mayor and City Council of Nashville and the Nashville and Chattanooga Railroad Company. Judgment was had for the plaintiff against both defendants. The Railroad Company have acquiesced in the judgment, but the Mayor and City Council prosecute a writ of error, and the error assigned is in the action of the Court, in overruling its demurrer to the declaration. The action is upon one bond, and in a second count upon sixty coupons. The bond was made profert of, and is alleged to be the bond of the Mayor and City Council, issued under their corporate name at the time, payable to the Nashville and Chattanooga Railroad Company, and by said Company endorsed, and the payment thereof

guaranteed; that the bond was issued under proper authority of law in aid of the Railroad Company as an internal improvement measure.

The second count makes profert of sixty coupons, alleged to have been cut from bonds of a similar character, the numbers of which are given. One of these is set out on profert, in the demurrer, in the following form:

"$30. To the Cashier of the Phœnix Bank, New York: Pay the bearer Thirty dollars, being half a year's interest, due 1st ———, 18—, on bond No. ——, Nashville R. R. bonds.

"V. K. STEVENSON, Pres't."

Stevenson was President of the Nashville and Chattanooga Railroad.

The grounds of the demurrer are, 1st, that profert is not made of the several bonds, the stipulations of which are set forth in the declaration. 2nd, that as the coupons are in the form of orders, no suit can be maintained without demand and protest; and 3d, that the coupons show no promise or undertaking on the part of the Mayor and City Council.

These objections have all been disposed of at the present term, in the case of *The Mayor and City Council* v. *The First National Bank.*

In the count suing upon the bond, that one bond is made profert of. In the count suing upon the coupons, they are made profert of; but the bonds from which they are alleged to have been cut are not made profert of. This we held unnecessary, that

the coupons circulate after they are detached as independent securities.

It is true these coupons, taken alone, do not purport to be the obligations of the Mayor and City Council, but it is averred they are the coupons from a number of bonds made under authority of law by the Mayor and City Council; that although the coupons are signed by Stevenson, President of the Railroad Company, the Mayor and City Council are also bound for their payment by the express terms of the bonds themselves. Upon the demurrer the allegation that these coupons were cut from bonds of this character must be taken as true. To sustain this allegation it was not necessary to make profert of the bonds.

The argument that there is nothing to protect the Mayor and City Council from the payment of any coupons, that bear the form and signature of these, whether lawfully issued, on part of their bonds or not, is not sound. The coupons are parts of the bond, if genuine; were signed by Stevenson, under proper authority of the Mayor and City Council, and they are as much bound to know, whether or not they are genuine, as if they were signed by one of their own officers.

The allegation of the declaration that they are genuine and taken from the lawful bonds, upon demurrer, must be taken as true. How the fact was established upon the trial it is not necessary to en-

quire, as there is no bill of exceptions. There is no error in the judgment, and it will be affirmed.

An execution was issued upon the judgment, and the Fourth National Bank was summoned to appear and answer the questions prescribed under the Statute for garnishees.

The Bank answered, that "On the 23d day of August, 1871, at the time of issuing the garnishment, the Bank did not owe the Nashville and Chattanooga Railroad any thing, but, on the contrary, the said Railroad owed the Bank a considerable sum of money. The Bank did not then have in its possession or control any effects or property of said Chattanooga Railroad Company; nor has it had since any property or effects of said Railroad; nor does it know of any person who did at that time, or since, have in their possession or control any property or effects of said Railroad Company, or who owed or does owe it any thing.

"It is proper to state, however," continues the answer," that W. A. Gleaves, treasurer, has an account with the bank; that he, as such treasurer, on the day of the service of said garnishment, had to his credit $11,825.51, and if his account shall be construed to mean the account of the Chattanooga Railroad Company, then it had that sum to its credit on that day, nominally; but in fact and truth the said Chattanooga Railroad Company, at that date and ever since, has owed the bank a much larger sum of

money than the balance to his credit on that day or any day since."

This answer was made September 5th, 1871. The plaintiff obtained leave to file additional interrogations, and in answer to these, the bank, among other things, said: "I suppose he (Gleaves) was, at the time of making said deposit, treasurer of the Nashville and Chattanooga Railroad Company, but I do not actually know the fact. My best impression or opinion is, that the money was the money of said Company, but how the fact may turn out I do not know. The Nashville and Chattanooga Railroad Company, as I understand it, in the name of W. A. Gleaves, treasurer, has had an account with the bank for some time. All moneys and accounts have been kept in the name of W. A. Gleaves, treasurer, and from the nature of the business and accounts, I supposed said Gleaves was doing business with us as the treasurer of said company. The funds have passed out on his checks as treasurer. The debts to the bank from the Chattanooga Railroad Company were created by loans or discounts from time to time, in the usual way of doing such business; the said $11.825.51 mentioned was not, at the time of said service transferred to the bank for what the company owed the bank, or for its indemnity. The bank had not, before the service of said garnishment, appropriated any of said $11,825.51 to what the company owed the bank. Gleaves, as treasurer, could, at the time of said service, have drawn out the

funds on his check, as it was to his credit as such treasurer. The bank has paid out all of said sums upon the check of Gleaves, *treasurer*, but not on an arrangement with the Chattanooga Railroad Company, but upon an indemnity of the Mayor of the city of Nashville."

This is the substance of the entire answer, and upon this the Court gave judgment against the bank, from which it has appealed.

It is well settled that where the amount exceeds fifty dollars the answer of the garnishee at law is conclusive. See 4 Hum., 299; 7 Hum., 132; 4 Cold., 242; 1 Swann, 90; 3 Head, 418.

The liability of the garnishee is not to be arrived at by surmises and inferences, but from direct admissions or conclusions, necessarily following therefrom. *Mores* v. *McMullan*, 4 Cold., 245.

There is some doubt, to say the least of it, whether this answer contains a distinct admission that the amount of the deposit in question was due the railroad company. If the proceeding had been by attachment or garnishment bill in Chancery, the question might have been contested by proof. *McCrae* v. *Bank of Tennessee and Vance*, 6 Cold., 474.

But in this proceeding, if the answer fails to admit facts sufficient to entitle the plaintiff to a judgment, then he must resort to some other proceeding.

For the argument, however, we will concede that this answer, in substance admits that the funds deposited in reality belonged to the railroad company; but

the answer, at the same time, distinctly avers that if this be so, the railroad company owed the bank a still larger sum. We understand it to be settled that if the garnishee owe the debtor, but the debtor owes him a larger sum, the garnishee will not be liable to a judgment upon these facts. See on this subject, *Arledge* v. *White*, 1 Head, 241; *Fay* v. *Reager*, 2 Sneed, 200; 3 Head, 56; *Fain* v. *Jones*, 3 Head, 308.

The deposit was a general deposit. There was no specific sum of money in bank that could be identified as the money of the railroad company; it simply constituted a charge against the bank in favor of the railroad company to that amount. It is true the bank admits that it had not transferred this sum or appropriated it to the payment of the amount due it from the railroad company, nor do we think this necessary. If there was mutual, independent debts between them, the larger amount being due the bank, upon general principles the bank could not, upon garnishment, be compelled to pay the amount due the railroad company, disregarding the liability of the latter to the bank.

It is argued that it does not appear what the debts owing to the bank were, or that they were due. The answer is that the railroad company owed the bank an amount larger than the deposit. The presumption is that the debts were due, or it could not be in strictness said that the debts were owing; but if this were even doubtful, the doubt must be solved in favor of the garnishee, for if it be doubtful whether the garnishee owes the debtor, there can be no judgment.

It is true that in the amended answer the banker says that at the date of the service of the garnishment, Gleaves, treasurer, could have drawn out the fund upon his check. We can only reconcile this with his former statement that at the time the railroad company owed the bank an amount larger than the deposit, upon the assumption that the bank would have voluntarily paid out on the checks of Gleaves the amount of the deposit, notwithstanding they held larger debts against the company; if so, this would give the creditor of the road no right to force the bank to do this. They might, if they choose, waive their legal rights and pay the checks of the railroad company, without funds, but as to the creditors, they could stand upon their legal rights. And this view may also explain the fact that the bank has, since the garnishment, paid out the funds upon the checks of Gleaves, or as it is said, the bank was indemnified against loss on this account.

As we understand the answer, there is no admission that the bank owed the railroad company at the date of garnishment or since an amount greater than the debts of the railroad company due to the bank. Without this there can be no judgment against the bank. Upon the answer, had the plaintiff been in a Court of Chancery, it might have contested the truth of this answer, but here the answer is conclusive. The judgment will be reversed and the bank discharged.

Nashville Life Insurance Co. *v.* W. H. Ewing, Adm'r.

# NASHVILLE LIFE INSURANCE CO. *v.* W. H. EWING, Administrator.

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1. INSURANCE. *Power to waive a forfeiture in life insurance policy. Expressly denied to officers can not be exercised.* A mere book-keeper, who has no authority to receive an overdue premium on a forfeited policy, and who had never done so except under instructions from the secretary, can not bind the company by so doing.

FROM DAVIDSON.

Appeal from the Law Court. JOE. C. GUILD, Judge.

G. P. THRUSTON for the Company.

THOS. L. DODD for Ewing.

MCFARLAND, J., delivered the opinion of the Court.

This is an action upon a policy issued by the Nashville Life Insurance Co., upon the life of Elvira Patterson. The plaintiff below recovered, and the defendant has appealed in error.

The plea and replication present a single issue. Under the contract the policy was forfeited by a failure to pay when due two quarterly payments of the second year's premium. The issue of fact presented was, whether or not the Company waived this forfeiture by afterwards accepting the payment of the pre-

miums. That such an acceptance of the premiums would be a waiver of the forfeiture is not seriously controverted.

The facts in proof are, that these quarterly payments fell due on the 3d of March and of June. The plaintiff, Ewing, who is the son-in-law and acted as the agent of the assured, was notified when these payments would fall due, in advance of the time they remained unpaid. About the last of July, one Reeves, acting for Ewing, called at the office of the Company to pay the premiums, but the money was not received. According to his testimony, he was told that Ewing must appear in person. According to the testimony of Smith, the Secretary, he was told, in substance, that the Company must receive satisfactory evidence that the assured was in good health before the money would be received; that this was their custom in case of forfeited policies.

The same day, while Smith was out of the office, Ewing called in person, and paid the amount falling due in June to Dashiell, the book-keeper, and received from him a receipt in the usual form. As to what passed between them at the time, they differ in their testimony. Dashiell says he did not assume to receive the money for the Company, but only proposed to take the money and hand it to the Secretary when he came in, and leave him to determine whether or not it would be accepted. According to Ewing's testimony, no such conditions were expressed at the time.

Very soon after Dashiell sent Bass, the porter, with a similar receipt for the March payment, and Bass delivered this receipt, and collected the money from Ewing. On the same day, when Smith returned, Dashiell offered him the money, and it was refused, Smith saying the policy was forfeited.

Upon inquiry, it was found that Elvira Patterson was then dangerously ill, and she died in a week afterwards. Dashiell sent for Ewing, and handed back to him the money paid, and obtained from him the receipts. As to what occurred at this time, the witnesses differ.

It is manifest from this statement that the case turned upon the question whether or not Dashiell had authority to bind the Company by receiving the money upon a forfeited policy, and thereby restoring it. This was purely a question of fact; it was submitted to the jury under a charge free from exception, and if there is evidence to support the verdict, we can not disturb it, and this is the question.

Dashiell proves that he was book-keeper; that he was also in the habit of receiving due premiums and handing out receipts, duly signed by the President and Secretary, left with him for that purpose, but that he had no authority to receive an over-due premium on a forfeited policy, and that he had never in a single instance done so except under instructions from the Secretary. The testimony of the Secretary, Smith, is to the same effect. Accompanying the pol-

icy is a printed notice to policy-holders, which, among other things, contains the following:

"The Company may, but solely as an act of grace or courtesy, and when the interest of the Company will not be in any way impaired thereby, restore a forfeited policy. When a restoration is applied for, the application must invariably be accompanied by a certificate as to the health of the person whose life was insured at his expense, from a physician acceptable to the Company. The agent forwarding such application, will be then notified of the decision made in the case."

It was proven by Smith, the Secretary, that it was the uniform custom of the Company to adhere to these regulations.

There is a manifest difference between the payment and acceptance of a premium on or before the day it falls due, and its payment afterwards; in the former case the policy-holder has the right to make the payment, and ordinarily the Company have no discretion as to receiving it. In the latter case it is discretionary with the Company as to whether they will waive the forfeiture and receive the money, and upon what terms they will do so, and the exercise of this discretion the Company may limit to such officers or agents as they may determine.

The bill of exceptions purports to contain all the evidence, it contains none inconsistent with the facts above stated. We do not see the evidence upon which the

jury found that Dashiell was authorized to waive the forfeitures and receive the payment of the premiums.

The positive evidence is that he had not the authority. We do not see that the Company ever held him out as having such authority; it does not appear that he ever exercised the power in any other instance. We do not regard the evidence that payment of these premiums was demanded after they fell due, by Bass, the porter, as important. There is no evidence that he had any authority to do so, unless it was from Dashiell, who himself had none.

Upon this ground we are constrained to reverse the judgment and grant a new trial.

John F. Anderson *v.* Joseph W. Binford and W. E. Murrell.

## JOHN F. ANDERSON *v.* JOSEPH W. BINFORD and W. E. MURRELL.

1. SURETY AND PRINCIPAL. *Judgment by motion. Local jurisdiction.* The jurisdiction to take judgment by motion in favor of a surety is local and confined to the Court of the county rendering the judgment against his principal, or of the county in which a defendant resides.

   Cases cited: Hall *v.* Thompkins, 9 Hum., 592.

   Code cited: §§ 3589, sub. 2, 3632.

   Acts cited: Act of 1801, ch. 15, § 1; Act of 1809, ch. 69, § 1.

2. SAME. *Same. Evidence.* The judgment must pursue the provisions of the statute, and show *upon its face* that the case comes within the statutory requirements, to give the Court jurisdiction. Extrinsic evidence can not supply necessary facts wanting in the judgment.

   Case cited: Cannon *v.* Wood, 2 Sneed, 177.

3. COURT OF EQUITY. *Party seeking equity must do equity.* Osburne and Anderson were partners in the tanning business. Osburne executed a note for $2,000, in the name of Osburne & Anderson, for hides, and procured Binford to sign it as security. The holder recovered judgment against Binford, and Binford took judgment by motion against Osburne & Anderson. Anderson filed a bill to enjoin the execution, upon the ground that he owed Binford nothing, and Binford was not surety for him. The judgment by motion was void for want of proper recitals. But the proof showed that Osburn had given Anderson $2,000 with which to pay this debt.

   *Held*, That though the pleadings did not look to relief from this source, yet, as the parties were all before the Court, it would compel the complainant, as a condition to the relief he sought, to pay to Binford the money so received by him, with interest, at the value of United States currency, when received.

FROM FRANKLIN.

BURTON, Special J., delivered the opinion of the Court.

NOTE.—After careful search, we have been unable to find the records in this and the following three cases, and for this reason the names of counsel appearing and Court have been omitted.

John F. Anderson *v.* Joseph W. Binford and W. E. Murrell.

On the 23d day of November, 1865, the defendant, Joseph W. Binford, obtained by motion, in the Circuit Court of Rutherford County, a judgment against the complainant (John F. Anderson) and one L. B. Osborne, in the sum of $2,361.66 and costs of suit. A writ of *fieri facias* issued on said judgment to Franklin County, which came to the hands of the defendant (W. E. Murrell), and was by him levied upon the property of the complainant (Anderson), who thereupon filed his bill in the Chancery Court of said county for a perpetual injunction against the execution of said judgment.

The grounds upon which this judgment by motion was rendered are as follows:

On the 17th day of October, 1862, Osborne executed and delivered to one J. A. Collier, a promissory note for $2,000, payable at thirty days, signed Osborne & Anderson. Binford, as is disclosed in the Record, signed the note as surety, though on the face of the note he appears as joint maker. The note was signed by Binford at the request of Osborne. Collier, as appears from the answer of defendant (Binford), sued Binford alone in the Circuit Court of Rutherford County, and on the same day on which the judgment by motion was rendered obtained judgment against Binford in the same amount; and thereupon judgment was rendered over against Anderson and Osborne, and in favor of Binford as surety, assuming that the complainant (Anderson) was partner of Binford in a "tan-yard," and was so liable

over to Binford as surety of the firm of Osborne & Anderson.

Complainant alleges in his bill that Osborne had no authority to sign his name to the note or to bind him thereby; that the judgment of the Circuit Court was rendered against him without notice, and that therefore the Court had no jurisdiction to render a judgment against him. The bill does not expressly impugn the judgment on the ground that it is wanting in any of the statutory requirements necessary to give to the Courts summary jurisdiction. But the defendant files a copy of the judgment by motion with his answer, as an exhibit, and asks that it be taken and looked to as part of his answer. And this brings us necessarily to consider the validity of this judgment by motion. Chapter 14, Article 1 of the Code, contains the general provisions regulating summary proceedings. Section 3589 is in the words following:

"The motion *shall* be made unless in cases where otherwise provided for by the Code, as follows: . ." Sub-section 1 relates to a motion against an officer for an official default. But Sub-section 2 is in these words: "When a motion is by a surety, it *may be made* in the county in which judgment has been rendered against him, or in the county in which any one of defendants reside." Article 7 of the same chapter, Section 3632, is: "Motions under this article may be made in any Court or before any Justice of the Peace having cognizance of the *amount*." And

this Article treats exclusively of motions in favor of sureties, stayors and accommodation endorsers. When these sections are collated, it does raise a question as to whether the words of the first quoted section, restricting the motion to the Court in which the judgment was rendered, or of the county in which a defendant resides are enlarged by the words of the last quoted section so as to give jurisdiction to any Court having cognizance of the *amount*, which would of course include the Circuit Court of any county in the State.

The case of *Hall* v. *Thompkins & Rutherford*, 9 Hump., 592, was decided under the Acts of 1801, chap. 15, § 1, and of 1809, chap. 69, § 1, which are very similar in their language to the sections of the Code we are considering. The first named Act provides for the case where the surety has paid the judgment, and gives him a remedy in the Court where the judgment has been entered against him, or within any other Court of competent jurisdiction in the State upon the production of a copy of the Record or judgment legally authenticated. The Act of 1809 makes the same provision in favor of a surety against whom a judgment has been rendered without payment, and in the same words, except that this may be obtained before any jurisdiction having "cognizance" thereof. In the case above referred to, it was held that these Acts authorized the judgment by motion in favor of the surety in the Circuit Court of any county in the State.

This authority would be controlling with us were it not for the fact that the Acts of Assembly upon which it was decided do not contain the material words restricting the jurisdiction to the Court where the judgment is rendered against the surety, *or of the county in which one of the defendants resides.* It is also observable that while the Act of 1809 authorized the judgment before any jurisdiction having cognizance thereof, Section 3632 gives the motion in any Court or before any Justice having cognizance of the *amount.* The leading object of this last section, we think, is not to confer jurisdiction upon the *Circuit Courts*, but to give jurisdiction by motion to Justices of the Peace. Giving, then, a fair interpretation to all of these several provisions of the Code, we think that the local jurisdiction to render judgment by motion in favor of a surety against whom a judgment is rendered, is confined to the Court of the county so rendering the judgment, or of the county in which a defendant resides.

In the construction of these statutes it has constantly been said by the Courts of Tennessee that the remedy being without notice, summary and contrary to the course of the common law, the judgment must pursue the provisions of the statute, and the proceeding upon its face must show that the case comes within the statutory requirements, or the Court will be without jurisdiction. Tested by these requirements, the judgment in this Record is void. It recites that it appeared to the Court that John A. Collier "has

this day obtained a judgment against the said J. W. Binford on said note;" but it nowhere appears in said judgment in what Court Collier had obtained the judgment, nor does it appear that either of the defendants, Anderson or Osborne, resided in the County of Rutherford. To be sure there is a strong presumption that Collier's judgment was obtained in Rutherford County, and the proof *aliunde* shows that such was the fact, but the judgment does not recite or assume either of the facts necessary to give the Circuit Court of Rutherford County jurisdiction to render this judgment. And the judgment can not be aided by extrinsic proof. 2 Sneed, 177.

2. This judgment, then, being void, does not fix and ascertain the liability of Anderson to Binford, and therefore the injunction should be made perpetual. But this does not dispose of all the questions upon which the parties are at issue in this Record. In addition to the allegations already quoted from the bill, complainant alleges:

"That he was not indebted to the said Binford in any sum whatever, nor did he ever have a business transaction with him in his life, nor was the said Binford ever bound for complainant as surety or otherwise, nor was any one authorized by complainant to bind him in any manner, in any business transaction with the said Binford."

It is true, literally, that Anderson, in person, had nothing to do with this contract about the leather, but it is abundantly shown that for a considerable

period, embracing the time of the execution of this note, Anderson & Osburne were partners in the ownership and operation of a tan-yard at Stevenson. And the proof is that this note of $2,000 was in part the consideration of a large lot of "partially tanned leather," bought by Osburne of Collier in the partnership name and on the partnership account.

Binford says in his answer that he knew that Anderson was a member of the firm, and that he was solvent; that it was on this account that he became the surety of the firm, and that he would not otherwise have done so. The terms of the partnership between Osborn and Anderson were not reduced to writing, and they, in their depositions, differ very materially as to the positive stipulations between them.

Anderson says that neither party was to sign the partnership name to any note, while Osburne proves that Anderson expressly told him to sign the firm name in all transactions about the partnership affairs. Of course these private stipulations between themselves would not affect contracts made with persons dealing with them in good faith, and in ignorance of such restrictions. While it is true that a strictly commercial partnership authorizes either partner to bind the firm by signing or endorsing commercial paper, the authorties seem to leave it doubtful whether an association in business of the kind we are dealing with does give implied authority to each member of the firm to execute negotiable paper in the firm name.

1 Hum., 23. And we prefer to rest this case upon a ground free from that difficulty.

One fact in relation to this note is distinctly proven by Osborne. And that is, that he gave Anderson $2,000 to pay this note to Collier. It is true that Anderson, in general terms, denies all knowledge of the existence of this note until after the execution was issued against him. But although his deposition is carefully taken in the case, he does not deny the specific statement of Osborne that he paid him the $2,000. We therefore conclude that the fact is as stated by Osborne.

We have seen that Binford can not hold Anderson responsible on the footing of the judgment by motion against him, but it does appear that Binford has paid, or satisfied in some way to Collier, the full amount of the judgment rendered against him on the original note, and we have just seen that Anderson has had for years the money of Osborne, (who was undeniably Binford's principal), in his hands to pay this very note. And certainly this raises the strongest equity in favor of Binford to have the money applied for his re-imbursement.

The pleadings are not framed with a view to this measure of relief, but we have both the parties before us, and think we have the right in this case to require Anderson, as a condition of the relief sought by him, to do equity by accounting to Binford directly for the money he received from Osborne. The proof is that he received it in Con-

federate money. And he must account for the value of it in United States currency, at the time he received it, on the —— day of ———, 1862, with interest thereon from that time.

It will be further seen from the decree of the Chancellor in this case, that on dissolution of the injunction about $900 has been paid, or levied out of the property of Anderson, for which sum the Chancellor gave Anderson a decree against Binford and his securities. The decree of the Chancellor must be modified in this respect, and the $900 will remain in Binford's hands until the account of the value of the Confederate money is taken.

The cause is remanded to the Chancery Court to take the account herein directed. Let a decree be entered according to the principles of this opinion.

In Matter of Bryant Ward *v.* Thomas Tunstall *et al.*

# In Matter of Bryant Ward *v.* Thomas Tunstall *et al.*

1. Bankruptcy. *Discharge in will not operate per se as an injunction on the State Supreme Court. When.* Proceedings in the Supreme Court can not be prevented by a plea, or suggestion and proof of a party's bankruptcy, who has been discharged since his appeal to this Court.

Cases cited: Bump on Bankruptcy, N. B., 377, p. 443; Swayne *v.* Longley, 4 Heis., 506.

FROM DAVIDSON.

Freeman, J., delivered the opinion of the Court.

The facts as given in brief are, that defendant, Thomas Tunstall, is dead, and the cause has been revived. Wm. Tunstall became the surety on the appeal from the Justice of the Peace to the Circuit Court. From the judgment rendered in the Circuit Court Wm. Tunstall has, since the appeal to this Court, been adjudged a bankrupt. It is asked on part of the bankrupt that he be allowed to file his plea, or take such steps as will relieve him from a judgment here. It is insisted that the proceedings in bankruptcy operate *per se* as an injunction on the State Courts.

The simple question is, whether we can, in this Court, on a plea of bankruptcy, since the case has been appealed here, allow the bankruptcy of the party

to be presented, either in the form of a plea, or on suggestion and proof of the facts, to defeat or prevent further proceedings.

The argument in favor of allowing such plea on the part of a defendant in this Court is based on the proposition, as stated above, that proceedings commenced in bankruptcy operate as an injunction on all State Courts *per se.* So far as this proposition goes to solve the question, we will examine it.

We are aware that a proposition has been laid down in several cases in the District Courts of the United States sitting in Bankruptcy. See *In. Re.* Rosenburg, 2d Bank's Reg., 81, and other cases which would seem to lead to this conclusion. But to this proposition we can not assent, either on sound principles, or on a fair construction of the Bankrupt Act of 1867.

The Federal Courts have power, by virtue of the power conferred in the Constitution on Federal Government, to pass laws providing for a uniform system of bankruptcy, and exclusive jurisdiction in the administration and execution of any law passed by Congress, to carry out this grant of power. It is clearly one of the express grants of power to the United States to pass such laws. It is equally clear that the Courts of that Government must construe and apply those laws, for the purpose of carrying out the power granted. But we do not see that this affects in any way the action or practice of the State Courts, without something more. Certainly they

are not required to take judicial notice of all proceedings in the Courts of the United States in matters of bankruptcy, and suspend all proceedings in cases pending before them, upon such knowledge.

Without laying down general propositions on the question, however, we look to the Bankrupt Act itself, and see if such is the requirement by its terms. Section 21 is mainly relied on in support of the view that a suit commenced before bankrupt proceedings is not to be proceeded in further, when proceedings have been commenced in Bankruptcy in Federal Courts. It is:—

"That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt; and all proceedings already commenced, or unsatisfied judgments already obtained, shall be deemed discharged and surrendered thereby."

This Section does not apply to this case. The debt is not alleged to have been proven. The next clause of this Section is:—

"And no creditor whose debt is provable under this Act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined."

And the next clause provides "that any such suit or proceedings shall be stayed upon the application of the bankrupt, to await the determination of the

Court in Bankruptcy on the question of discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge." And provided also, "that if the amount due the creditor is in dispute, the suit, by leave of the Court in Bankruptcy, may proceed to judgment, for the purpose of ascertaining the amount due, which amount may be proved in Bankruptcy, but execution shall be stayed as aforesaid."

It was held in the case of *World Company* v. *Brooks*, 3 Bank. R., 146, cited in Bump on Bank., N. B., 377, that this clause contemplates an application by the debtor for a stay of proceedings.

We think the true construction of the clause is, the creditor having proceedings pending in Bankruptcy is to apply to the Court where such proceeding is pending for such stay of proceeding as is authorized, and that Court shall make such order as may be deemed proper for the protection of the bankrupt. Such is the idea conveyed in the clause, as shown by the language of the last proviso, allowing the suit to be prosecuted to judgment to ascertain the amount due, "by leave of the Court in Bankruptcy."

We do not say what would be the effect of the interposition of the plea of pending proceedings in Bankruptcy, interposed in a Court of inferior jurisdiction. We think, however, it would be a defence to the action, where the creditor was shown to be a party to the Bankrupt proceeding, and has proven his claim, as he ought not to be permitted to prose-

cute a suit in both forms, the one in the State Court and the other in Bankrupt Court, for the same debt, the bankrupt proceeding being one on the part of the debtor against all his creditors who are notified, in which he seeks a discharge, and they . . . so far as proving their debt, and having a *pro rata* distribution of the assets of the bankrupt. We think, therefore, this section, taken altogether, only authorizes in a case where the suit was commenced before the commencement of bankrupt proceedings by the Bankrupt Court, on application of the debtor, by the ordinary injunctive power of that Court.

But another ground on which the case has been presented is, that the bankrupt is, in the eye of the law, dead, *civiliter mortuus*. This is a figurative mode of expressing his status, sometimes used, but this expresses only the fact, that by operation of law his property of every kind is transferred to the assignee in bankruptcy, and is being administered for distribution among his creditors. He is not, in fact, dead, but lives, and may if he chooses, allow a judgment to be rendered against him, even after a discharge, and no one can object. He may plead his discharge, and defeat it, when by the course of practice of the Court where he is sued, he stands in condition to file such a plea, but the plea is one on which an issue may be taken, and then he must sustain it by the proper evidence, to-wit: the certificate furnished him by Bankrupt Court, or it might be replied, that the debt sued on was one of the excepted

class of debts exempted from the operation of the bankrupt law, or that the Court granting it had no jurisdiction. See cases cited in Bump on Bank., Notes, p. 443.

This being so, this Court would have a case originated here, on which evidence must be adduced and a trial had. Contrary to the well-established principle of its organization, that its jurisdiction is only appellate, and such as is strictly incidental to the exercise of such appellate jurisdiction. Such questions are appropriate to an inferior Court, but not to this tribunal. We have no statute that meets the case, and do not feel inclined to adopt a rule of practice that shall bring the investigation of such questions before us. The business of this Court is to revise the action of the inferior Courts; to examine the record of their proceedings, and see if there is or is not error in what they have done. If the record before us shows no action of the Court below on the question, then we can take no cognizance of it. It was so held in a case at Jackson, April Term, 1871, of *Longley* v. *Swayne*, where it was sought to abate the suit in this Court, by suggestion of bankruptcy of Longley, the plaintiff below, by suggesting his bankruptcy, but it was held that this Court would not look into the question. It is proper to say that the writer of this opinion took no part in that decision, having been of counsel for Longley in Court below.

The question is presented before us in briefs, as

to what shall be the practice in case of bankruptcy of plaintiff after appeal to this Court, but as we have not the question before us on any statement of such case, we decide nothing in the case, farther than has been said above. When an application to be substituted as plaintiff shall be presented by an assignee, we will consider the question.

As to the first question presented, it has been urged that we can render no judgment against the party defendant. On the record when presented, to which we can alone look, in our view of the case, a judgment can be rendered, and then if the debtor desires to be relieved, he will find no difficulty in being protected from payment of improper judgments, in Bankrupt Court or by an original proceeding in a State Court, where he can make such issues as will raise the question, and as he is precluded from interposing his defence from arising out of his bankruptcy, the judgment here will not interfere with his case in any way.

J. A. Granberry, Adm'r, *v.* J. M. Frierson.

## JAMES M. GRANBERRY, Administrator, *v.* JAMES M. FRIERSON.

1. CONTRACT EXECUTORY. *Failure to receive the property by vendee. Right of vendor to re-sell or rescind.* Where the time of delivery in the sale of cotton was not fixed. Held, if the owner gave the purchaser notice of his readiness to deliver the cotton, and he failed to receive it, after a reasonable time he may give notice and re-sell at the purchaser's risk, or treat the contract as rescinded.
2. SAME. *Re-sale without proper cause. Damages.* If the sale be made under circumstances as will not authorize the owner to regard the contract as rescinded, and for a better price, in an action for damages the purchaser will be entitled to the difference between the agreed price and that received, less the reasonable cost and expenses of the re-sale.
3. CHARGE OF COURT. *Error to re-call the jury and re-charge without their request or that of counsel.* It was error to recall the jury and repeat to it a portion of the charge, the jury not asking and the defendant objecting to it.

Case cited: Swaggerty *v.* Caton, 1 Heis., 202.

FROM SMITH.

TURNEY, J., delivered the opinion of the Court.

If the defendant agreed to sell and the plaintiff to buy the cotton, but the time of delivery was not fixed, the defendant would then have the right to notify the plaintiff to pay the price and receive the cotton, and if the plaintiff failed to do so in a reasonable time, the defendant might, at his election, give the plaintiff notice and re-sell the cotton at his risk, or treat the contract as rescinded by the assent of

the plaintiff, implied from his failure to execute his part.

If the circumstances were such as not to authorize the defendant to regard the contract as rescinded, but she nevertheless re-sold the cotton for a better price than that contracted to be given by the plaintiff, in an action therefor the measure of the plaintiff's damages would be the difference between the agreed price and that received by the defendant, less the reasonable costs and expenses of the re-sale. We observe no other material error in the charge.

It was error to recall the jury and repeat to it a portion of the charge, the jury not asking and the defendant objecting to it. This case falls strictly within the rule in *Swaggerty* v. *Caton*, 1 Heis., 202.

Reverse the judgment.

Wm. Galloway *et al.* and Sarah Perry *v.* Wm. Galloway *et al.*

## Wm. Galloway *et al.*, and Sarah Perry, Executrix of Rorert T. Perry, and Young S. Pickard *v.* Wm. Galloway *et al.*

1. Allegations in bill. *Competent for complainant to show amount due him. When. Pleading. Practice.* Where the allegations of a bill do not state the exact amount of indebtedness, but allude to various sums which complainant may have to pay, and there is a prayer for general relief, then the complainant may show by proof what the sum due him is, nor is it material that no account was prayed for.
2. Same. *Bill of review. Supreme Court will not re-examine evidence under. When.* The Supreme Court will not, under a bill of review, re-examine evidence to ascertain whether a decree is sustained by the proof or founded upon improper or insufficient evidence.

   Case cited: Eaton *v.* Dickinson, Adm'r, 3 Sneed, 397.
3. Taking of account. *Notice. Want of. Not error to be corrected by bill of review. When.* While the want of notice of the taking of an account is matter of exception, it is not error of a character to be corrected by a bill of review.
4. Same. *Demurrer may be filed. When. Pleading.* A defendant may file his demurrer, even though a motion to dismiss, containing the same objections as embraced in the demurrer has been disallowed.

   Code cited: § 3157.

FROM MAURY.

Deaderick, J., delivered the opinion of the Court.

These two bills were filed respectively on the 20th of September, 1867, and 4th of April, 1868, in the Chancery Court at Columbia, to review and reverse

decrees rendered against said complainants in said Court, in favor of Galloway and Matthews.

The ground upon which reversal of the decrees is sought is, that there are errors apparent upon the face of the decrees, and several grounds of error are assigned in the bills.

At the October term, 1868, demurrers were filed to both bills, with the answers, and were set down for argument and heard together, the Court, by consent of the parties, having ordered that the two cases be consolidated and heard together.

Upon the argument of the demurrers, the Court overruled the demurrer to the bill of Wm. Perry, Jr., upon the ground that a motion to dismiss at the previous term had been made and disallowed, and upon the construction that the motion to dismiss covered the objections to the bill taken by the demurrer, and had been passed upon a previous term. The demurrer to the bill of Mrs. Perry, executrix, and Y. S. Pickard was allowed and their bill dismissed, and both causes were brought here as to the bill of Wm. Perry, by leave of the Court, by appeal, under the provisions of our statute allowing an appeal in the discretion of the Chancellor upon overruling a demurrer. § 3157 Code.

The original bill was filed in 1861, by Galloway, Vaughn & Matthews, against Wm. Perry, Jr., and others, alleging that said Perry was indebted to them severally, and was about fraudulently to remove his property from the State. They prayed for an attach-

ment, which was levied upon a considerable amount of personal property, which was replevied by said Wm. Perry, Jr., Robert T. Perry, the testator of complainant (Sarah), and Young S. Pickard becoming his sureties on the bond.

Vaughn's debt was satisfied, and the bill was dismissed as to him. Matthews' debt is not seriously contested, being for a comparatively small amount, and the main controversy is as to the decree in favor of Galloway.

In the progress of the original cause, an account was ordered at the September term, 1865, which was taken by the Master and result reported, to which report the solicitor of Perry filed several exceptions, all of which were allowed. After the exceptions were allowed, the report showed $313.48 due Matthews, and $3,592.77 due to Galloway, for which sums respectively a decree was rendered in their favor at the March term, 1866, and a further report was directed to be made by the Master, as to what had become of the property attached, the bond of Perry and his sureties having been lost or destroyed.

At the September term, 1866, an order was made, in which it is recited that it is suggested that the property in this case attached was replevied by Perry, and that he gave bond, with Robert T. Perry and Y. S. Pickard as his sureties, and it being admitted that said Robert T. is dead, and said Sarah C. is his executrix, by consent of complainants and said Pickard and Sarah C., and their counsel, said Sarah C.

and Pickard are admitted and made parties defendant in said cause, but as to whether they (Pickard and Robert T.) were securities or liable upon said bond, and the extent of their liability was not adjudged, but reserved, and the cause was left open for either party to take proof.

Depositions were taken, and the Master having reported on the testimony taken, that some eleven slaves and a large amount of other property was attached, and that Robert T. Perry and Y. S. Pickard were the sureties upon a replevin bond executed for the delivery of the property, and no exception being taken to the report, it was confirmed, and the Court proceeded to render a decree against Sarah C., executrix, and Pickard for the amount of the recovery of complainants.

1. It is objected that the decree is erroneous upon its face, because it adjudges a greater amount due to Galloway than is claimed by his bill.

Galloway's allegations in his bill are that Perry is justly indebted to him on a final settlement some $500 or $600, or perhaps a larger amount, and that he is stayor and security for him for about $700 or $800. The amount of indebtedness is not precisely stated, nor does Galloway assume to know how their accounts stand, as they had had large transactions as co-contractors in building a railroad, but he prays that the proceeds of sale of said property may be applied to the complainants' debts against Perry, and to relieve him of liability as stayor and security for

him and for general relief. Under these allegations we think it was competent for the complainant to show what the true amount of indebtedness to him was, nor do we think there is any thing in the objection that no account was prayed for in the bill. The Chancellor might well direct the Clerk and Master, for his own relief and satisfaction, to ascertain the amounts due to complainant.

It was no injury to defendant that he was afforded the opportunity to contest the question of his liability on the coming in of the Master's report.

Neither is there any thing in the fact insisted on that Perry had no notice of the taking of the account. For this reason he might have excepted, but it is not error of a character to be corrected by bill of review.

Many other errors are assigned in the bill and in argument which, or some of which, might be grounds of reversal upon appeal. But we are precluded in proceedings under bills of review to re-examine the evidence to ascertain whether the decree is sustained by the proof, or whether it is founded upon insufficient or improper evidence; but the inquiry is, whether the decree, in point of law, is erroneous, upon the facts assumed in the decree itself. 3 Sneed, 397.

The facts assumed in the decree are that the defendant (Perry) is indebted, and that Robert T. and Pickard were his sureties for the forthcoming of a large amount of property, more than sufficient to pay this indebtedness, and that they are liable as such

sureties to the amount of the debts due complainants, for which decree was rendered.

The demurrer to the bill of Sarah C. Perry, executrix, and Y. S. Pickard was properly sustained. And the demurrer to the bill of Perry should also have been sustained, as the defendant is not deprived of his right to demur, because he has previously entered a motion to dismiss, which has been disallowed.

The decree dismissing the bill of Sarah C. Perry, executrix, and Pickard will be affirmed, and the decree overruling the demurrer to the bill of Perry will be reversed, and the demurrer will be sustained and the bill dismissed.

J. Kelso *et al.* *v.* Vance and Eddins, Adm'rs.

# JEFFERSON KELSO *v.* VANCE and EDDINS, Adm'rs, and HENRY H. SUGG *v.* VANCE and EDDINS, Administrators

1. ADMINISTRATION. *Public sale by, of personal property. Can not be avoided. When.* Where an administrator, by authority of the sole distributee, in whom the legal title exists, sells personal property at public sale, no one can be heard to complain except a creditor or an administrator, *de bonis non*, seeking the property as assets to pay debts, especially when the purchaser has held the property long enough to perfect his title under the Statute, and has not the power to return the same.

Case cited: McLean *v.* Houston, 2 Heis., 38.

2. SAME. *Confederate money. Abatement of same. When.* Where notes are given with the understanding that Confederate money will be received in payment of the same, the debtor will be entitled to abate the amount of the sum to be paid, to the value of Confederate money as compared with United States currency at the time the notes fell due.

Case cited: Thornington *v.* Smith.

FROM LINCOLN.

Appeal from the Chancery Court. D. M. KEY, Chancellor.

W. B. MARTIN and W. F. KERCHEVAL for Kelso *et al.*

P. TURNEY, E. COOPER and EDWARD H. EAST for Vance and Eddins, *et al.*

FREEMAN, J., delivered the opinion of the Court.

The original bills in this case are filed by a number of persons, who purchased slaves at a sale

made by Jacob Vance and Hugh Eddins, who were administrators of S. G. Eddins, deceased. Said S. G. Eddins died in, perhaps, the latter part of 1861. The object of the bills is to enjoin suits brought by Vance and Eddins on the notes given for th negroes, on the ground that the negroes were sold by the administrators without an order of any court, and that this was a fraud on the purchasers, and they obtained no title. S. G. Eddins died unmarried, leaving no issue, and his father, Abraham Eddins, was his sole distributee.

The facts in reference to the sale are, that S. G. Eddins left a considerable estate, both real and personal, at his death, in Lincoln County. His father being the sole distributee, as the proof shows, executed an instrument of writing in January, 1862, or thereabouts, in which he authorized the said Vance and Eddins, the administrators, to sell the slaves of the estate except two, and after paying debts with proceeds, he gave the surplus to his children, the brothers and sisters of the deceased. In pursuance of this authority, the administrators proceeded to sell the slaves at public sale, when the complainants became the purchasers, gave their notes, and took possession of the negroes, retaining them until they were emancipated.

Can they now rescind the contract, and enjoin the collection of the notes given for the purchase-money? We think not, because the sale was made by the parties by virtue of the power given to

them by the only distributee, Abraham Eddins, in whom was the legal title, subject only to be divested on regular sale under decree of a Court of competent jurisdiction, at suit of the administrator for payment of debts. They were personal property, and while the sale, without the order of Court by administrators, would be void as to the distributee, if he gives his assent to it, no one can complain, except, perhaps, it might be creditors whose debts were unpaid, or an administrator, *de bonis non*, seeking the negroes as assets to pay debts. No creditors or such administrator being before the Court, and the owner of the legal title, the distributee, assenting to the sale and delivery of the property, the parties rightfully got possession of the slaves and held them for three years and more adversely as their own property, and now come into a Court of equity, and ask to be relieved of the purchase-money, after the negroes have been emancipated, and it is impossible to restore the property. We do not think this can be done.

It is insisted, however, that the sale was a fraud on them by the administrators. We see no evidence of this whatever in the case. The administrators sold the negroes by virtue of the authority given them by the owner of the legal title, and did not pretend to have an order of Court to do so. Nor is there any proof to show the purchasers believed, or were led to believe, such was the case.

The case of *McLean* v. *Houston*, 2 Heis., 38, is

cited to support the position that merely selling as administrators was a fraud. That case does not sustain the argument. In that case a party purporting to act as executor, and representing himself as such, fraudulently, as the plea alleged, when in fact he had not proven the will, and was not executor at all. No such false representation is found in this case. There being no fraud in the case, the simple question is, whether a party who purchases a slave and holds it long enough to perfect his title under the Statute of Limitations, can refuse to pay the purchase-money, and rescind the contract, when he is totally unable to return the property. As we have said, we think he can not.

Another question is presented by a bill filed on the part of Abraham Eddins and the brothers and sisters of deceased, in which they seek to enforce the notes given to the administrators, on the ground that the administrators are estopped by their sale from suing for the negroes; that the possession of the purchasers was a conversion of the property, and that Abraham Eddins has the right to take the property, or its proceeds, and asking to enforce the collection of the notes, in order to realize a fund to pay the debts of the intestate, and have surplus distributed.

This bill can not be sustained. The notes were taken to the administrators under the authority given them by Abraham Eddins, and sale made in pursuance of it. There is no reason why he should intervene. In fact, it is an effort on their part to claim that

the sales were void, and yet collect the purchase-money; while, if the sale had been made without the authority of Abraham Eddins, he might recover the slaves as his property, he can not disaffirm the sale and recover the contract price. He might have, after demand made, recovered the value of the slaves, as on a conversion. But this is not attempted. Without discussing this bill, we hold it must be dismissed, at costs of parties.

It appears, however, that the negroes were sold with the announcement that they could be paid for in Confederate money, and the notes given were, therefore, Confederate contracts, under the rule in *Thornington* v. *Smith*, which we have repeatedly recognized.

The result is, that the purchasers are not entitled to the relief they seek, of an injunction against the notes, but are entitled to abate the amount of the sum agreed to be paid, to the value of Confederate money, as compared with United States currency at the time the notes fell due.

The bill of Abraham Eddins *et al.* will be dismissed, at cost of complainants, in this and Court below. An account will be ordered between the purchasers at the sale and administrators, to ascertain the value of the amount of the notes in United States currency, for which purpose the case will be remanded, and the administrators will be entitled to a decree for the sum ascertained on coming in of report. The costs of the purchasers' bills will be

divided between the administrators and the purchasers in this and Court below, in each case.

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We have examined the petition for re-hearing in this case, and the Court unanimously affirm the views heretofore given. On re-examination, the only difficulty we have is, as to whether we were correct in abating the amount of the notes to the value of Confederate money, but as no judgments seem to have been rendered in the cases before injunction, this is proper. If judgments had been rendered, we could not order the reference to ascertain the value of Confederate money.

FREEMAN, J.

## SMITH CARNEY *v.* P. T. MURPHY.

FORCIBLE ENTRY AND DETAINER. *Writ of possession. Practice.* An appeal from an interlocutory order of the Circuit Court granting a writ of possession in a case of forcible entry and detainer before final judgment, is premature and will be dismissed.

Statute cited: Act of 1869–70, ch. 64, § 1.

FROM COFFEE.

Appeal from the Circuit Court. WM. P. HICKERSON, Judge.

[No brief or attorney appears for Carney.]

JAS. PRICE for Murphy.

SNEED, J., delivered the opinion of the Court.

The Act of 1869–70, ch. 64, § 1, authorizes the writ of possession after judgment for plaintiff in actions of forcible entry and detainer, or of forcible detainer before three Justices, upon appeal by defendant, if the plaintiff will give bond as therein prescribed. Shank. Rev., 124.

The Act of 1871, ch. 65, amends the former Act so as to include cases of unlawful detainer. In this case of unlawful detainer the plaintiff had judgment before three Justices, from which the defendant appealed to the Circuit Court. In the latter tribunal

there was a mistrial, and thereupon the plaintiff presented his bond as required, and demanded a writ of possession, which was awarded. From this interlocutory judgment awarding the writ of possession the defendant appealed. The appeal was premature, and could only be granted upon final judgment. The object of the statute was to give the plaintiff a quick and summary remedy to recover possession when unlawfully withheld, and the remedy of the defendant is upon the plaintiff's bond, if upon final judgment it should turn out that the writ was unlawfully awarded.

The appeal is dismissed and cause remanded.

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## WISENER & BROWN, Executors, *v.* MAUPIN and WIFE, *et al.*

1. WILLS. *Issue* devisavit vel non. *Jurisdiction of Circuit Court. Practice.* The Circuit Court has jurisdiction to try an issue of *devisavit vel non* when the probate has been set aside, and the case certified to that Court. If the original bill be not sent up under § 2173 of the Code, the Circuit Court will not be deprived of jurisdiction, but may compel the County Court by *certiorari* or *mandamus* to do its duty. The jurisdiction of a Circuit Court of an issue of *devisavit vel non* is not appellate but original.

Case cited: Patton *v.* Allison, 7 Hum., 328.

Code cited: § 2173.

2. SAME. *Same. Executors. Duty of. Estoppel.* Upon an issue *devisavit vel non* the executors should have the original will in Court for probate, and failure to do so will not entitle them to prevent the trial by their own default, and if they present a copy with which they are satisfied, they are estopped from objecting to a contest made upon the same.

3. SAME. *Same. Jurisdiction of Chancery Court.* The Chancery Court has jurisdiction to set up a supposed or destroyed will, upon proof of its execution and contents, while the Circuit Court may try an issue *devisavit vel non* on a copy of the original, its correctness being acknowledged.

Cases cited: Buchanan *v.* Mattock, 8 Hum., 390.

4. SAME. *Same. Testamentary capacity.* The question of testamentary capacity is, "whether the testator, at the time of making the will, knew and comprehended what he was doing." A will is not valid unless the testator intends of his own free will to make such a disposition, and is capable of knowing what he is doing and understanding to whom he is giving his property, and in what proportion, and whom he is depriving of it.

Cases cited: Nowling, ex'r, *v.* Nowling, 2 Sneed, 634; 39 Penn., 191; 11 Mich., 459; Redfield, Vol. 1, 132.

Wisener & Brown, Executors, *v.* Maupin and Wife *et al.*

5. SAME. *Same. Evidence. Testator's knowledge of contents.* Where the will was not read to the testator, and he was illiterate, it must be shown that he knew its contents, and this may be shown by circumstances, and where the testator was old, illiterate and diseased, full and satisfactory proof that he knew the contents of the will is required.

6. DEPOSITION. *Filed in proper time. Clerk's neglect to endorse filing not to prejudice. When.* When the Court is satisfied that a deposition was in fact filed within the proper time, the fact that the Clerk failed to make the proper endorsement on it will not be held to prejudice the interests of the party to be benefited by such deposition.

7. SAME. *Same. Evidence. Provisions of the will.* A testator who is qualified may make his will as he pleases, though he disinherits his children. But when the will is attacked upon the ground of undue influence, the provisions of the will may be looked to as evidence whether it was made freely and rationally or under undue restraint.

Cases cited: Redfield, Vol. 1, 520-1, 78, 374, § 14, 525, 517, Note 22; Law Register 6th, 80.

8. WITNESS NOT EXEMPT FROM RULE, THOUGH PARTY TO SUIT. *Exception in favor of employed counsel.* Though a witness be a party to a suit, he will be equally subject to be put under the rule with other witnesses, and the only exception made is in favor of employed counsel.

9. SAME. *Same. Evidence. Wife of testator incompetent witness. When.* Where the will is attacked upon the ground of fraud or undue influence exerted by the wife while she was married to testator, or upon the ground of unsoundness of mind or capacity to make a will; she is equally incompetent in both cases.

10. WITNESS. *Testimony of as to soundness of testator's mind.* After a witness had given the facts of his knowledge of and acquaintance with the testator, he was asked: "From these facts, state whether, in your opinion, he was of sound mind and disposing memory?" The answer is: "He was not of sound mind and disposing memory." The Court allowed the answer so far as the statement that he "was not of

sound mind," but refused to allow and sustained the exception as to the question of "disposing memory."

*Held*, There was no error in this.

Cases cited: Gilesan *v.* Gilesan, 9 Yer., 332; Norton *v.* Moore, 3 Head, 482; Clay *v.* Clay, 2 Iredell, 78.

## FROM WILLIAMSON.

Appeal from the Circuit Court. WM. P. MARTIN, Judge.

JOHN B. MCEWIN, DAVID CAMPBELL and WISENER & SON for Wisener & Brown.

E. COOPER, S. H. WHITTHORNE, BUCHANAN & KEEBLE, and WARDER for Maupin and wife *et al.*

FREEMAN, J., delivered the opinion of the Court.

This case involves an issue of *devisavit vel non*, on the validity of the will of Benjamin Brown, who died in Bedford County about the year 1857.

The case was transferred from Bedford to the County of Williamson, where a trial was had and a verdict of a jury, finding that it was not the will of Benjamin Brown, which the Court refused to set aside, from which there is an appeal in error to this Court.

The estate being a considerable one—worth perhaps between fifty and seventy-five thousand dollars—the case is pressed upon our attention with great earnestness and zeal by counsel on both sides. Numerous

errors are assigned on the facts of the Record for reversal, which we proceed to dispose of.

First, it is insisted that the Court erred in not sustaining the motion of the plaintiffs in the Record (the executors of the will) to strike *the case from the docket* for want of jurisdiction on the part of the Circuit Court of Bedford County, made at the December term, 1865, of said Court, but made on the 6th of January, 1870, it being a part of said term.

It appears from the Record that in July, 1869, Robert Brown, Robert C. Maupin and wife (Eliza Jane—formerly Eliza Jane Brown) being the only children of Solomon Brown, deceased, who was a son of testator (Benjamin Brown), and consequently his grand-children, filed their petition in the County Court of Bedford County, to set aside the probate of the will in common form, and have it re-probated in solemn form in the Circuit Court, on an issue of *devisavit vel non*. This petition alleges the death of Benjamin Brown in 1857; that he made and published a paper writing purporting to be his last will and testament, which had been presented to the County Court of Bedford in 1857, by W. H. Wisener and William Brown, executors, and proved in common form. The petition states further that the petitioners were minors at the date of probate of the will; had no notice of the probate; had only a short time before this come of age; had been cut off from any share in the estate except a mere pittance; and then alleges that the paper was not the last will and

testament of Benjamin Brown, was obtained by fraud and undue influence, and that he was *non compos mentis*—an imbecile—at the time of its execution. The petition concludes with the proper prayer, and adds, "a copy of the will is herewith tendered."

This petition was answered by the executors, in which they admit the making of his will, its probate in common form, at the June term, 1857, but insist that he was of sound mind; deny the fraud and undue influence, and then insist that the petitioners have no ground on which to ask that the probate in common form be set aside, or to an issue of *devisavit vel non.* The Court made an order setting aside the probate in common form, and ordered that the cause be certified to the Circuit Court of Bedford for a trial on an issue of *devisavit vel non,* on the parties giving the security required by law.

The transcript of these proceedings was certified to the Circuit Court and duly filed. On the 23d day of December, 1869, on motion of defendants, an order is made, allowing them to take the depositions of various parties in this case. On the 6th of January, 1870, of the same term, the plaintiffs (the executors, by attorney), moved the Court to strike this cause from the docket, for want of jurisdiction, which was overruled by the Court. Thereupon the contestants moved the Court for notice to issue to the legatees to come into Court and enter into bond, as required by law, and then that the executors be compelled to prove the alleged will of Benjamin Brown

in solemn form, and make up the issue of *devisavit vel non*, and thereupon the executors moved the Court for a *certiorari* to the County Court Clerk, to certify the will and records probated in this cause, which last order was made. It appearing that no issue had been made up, and a number of witnesses being in attendance, their costs were ordered to be taxed to the parties summoning them.

It will be seen that the Court took no action on the motion of contestants to compel the executors to prove the will. The motion was made, but the Court made no order on it, no doubt on account of the fact that on the making of this motion the executors immediately moved for a *certiorari* to the County Court Clerk to send up the will, on which the issue was to be made, so that the after production of the paper purporting to be a copy was voluntary on the part of the executors.

The counsel of the executors insist there was error in the Court refusing to strike the cause from the docket on their motion, for want of jurisdiction. The question naturally presents itself, on what grounds could such action of the Court have been justified at that stage of the proceedings? It is clear that the Court had jurisdiction of the subject matter and of the parties—that is, to try an issue of *devisavit vel non*, when the probate in common form had been set aside, and the cause certified to the Circuit Court for trial. But it is said the original will was not sent up from

the County Court, as provided for by Section 2173 of the Code. That section is as follows: "Where the validity of any last will and testament, written or nuncupative, is contested, the County Court shall cause the fact to be certified to the Circuit Court, and send to said Court the original will, and shall require the contestants to enter into bond with security in the penalty of five hundred dollars, payable to the executor mentioned in the will, conditioned for the faithful prosecution of the suit," etc.

It is obvious this section contains only directions to the County Court, which the County Court is bound to obey, and which, if neglected or refused by them, might be enforced by the Circuit Court by virtue of its supervisory power over inferior tribunals, either by *certiorari* for a complete record, or in a proper case by *mandamus*; but how such failure on the part of the County Court or its Clerk could be a matter affecting and defeating the jurisdiction of the Circuit Court to make up and try an issue of *devisavit vel non*, we are not able to see. It would be conceded, we suppose, that the Court properly made the order at the request of the executors, granting a *certiorari* to compel the County Clerk to certify the will and proceedings and send them to the Circuit Court. If this is correct, on what principles can the authority of the Court rest to make such order, except that the case was in that Court, and the Court had jurisdiction to try it, and therefore could compel the other

Court to furnish the papers required by law to be furnished, in order to the making up of the issue, and further proceeding with the case.

It was the duty of the executors to propound the will in the first place in the County Court, and then to maintain it on the contest in the Circuit Court. 7 Hum., 95. And he is the formal and necessary party against whom the suit is brought, to set aside the will and have it re-probated in solemn form. 11 Hum., 487.

This being true, it follows necessarily that it was the duty of the executors to have the original in Court for probate, and if they failed to do so, they could not ask the Court to strike the case from the docket and prevent the trial of the case on the issue of *devisavit vel non*, by their own default. If the failure was that of the County Court Clerk, or the Court, they had their remedy, as we have stated. The parties, then, whose duty it was to propound the will for re-probate, the probate in common form having been set aside, are the parties who come and move the Court to strike the case from the docket, for want of jurisdiction, and now allege that the Court erred in not allowing their motion, because, they say, the original paper, which it was their duty to prove, or at any rate their duty to affirm and maintain as the will of their testator, had not been sent up with the transcript. We can see no principle on which such a motion could have been sustained. We must

try the action of the Court by the case as it stood before him when the motion was made and acted on, and at that time we think it clear the only motion plaintiffs could properly have made was the one they did make for a *certiorari*, which was ordered by the Court to bring up the will and the proceedings on file from the Court below.

It is urged, however, that the sections of the Code do not provide for the case, and require the original will to be sent up, and that Section 2179 provides that if the original be lost or mislaid so that it can not be produced on the trial of the issue, but the paper has been copied into the pleadings, or spread on the minutes of the Court, the Court is then authorized to proceed with the trial as if the original were present. It is conceded that the first section of the Code does require the County Court to send up the original, and it is also conceded that the last section quoted does not provide for this particular case, but for a different one, where the paper has been copied in the pleadings or on the Record in the Circuit Court.

But because this has no application to the particular case in hand, it does not follow that the mere absence of the original will from the Record sent up by the County Court, and the sending of a copy instead is a jurisdictional fact, and that the Court should at once strike the case from the docket for this cause, but only that the party whose duty it was to

prove the paper, or the Court on its own motion should have taken proper steps to supply the deficiency.

In the case of *Allen* v. *Allen,* 2 Tenn. R. (Coop. Ed.), 173, an exception seems to have been taken to the jurisdiction of the Circuit Court on this very ground, that the statute had given no power to admit to probate a copy of a will. The Court say: "We deem it sufficient answer to that objection to say that the Court had jurisdiction of the subject matter, and the parties were competent to agree on the mode of proceeding, they having agreed to try on the copy in that case, but if the argument insisted on here be correct, and there is such a want of jurisdiction as authorized the Court to dismiss the case, or rather strike it from the docket, then no consent could give jurisdiction to the Court, the *law* having given no such jurisdiction. But the Court decide that the Circuit Court did have jurisdiction of the subject matter, and that consent of the parties waived the irregularity of want of the original.

It is true the Court add that the decision in that case could only affect the parties to it. By the Act of 1851–2 (Code, §§ 2174, 2175), on notice to the legatees or devisees, being adults, they must come in and be made parties, and give bond for prosecution of the suit, and on failure or refusal the will is held for naught, and the property is distributed as in cases of intestacy, so that there can be no difficulty in binding all adult parties by the proceeding, even if

the statement of the Court in the above case be correct.

In looking further into the proceedings, it is clear that the executors and parties are bound by an estoppel, or at any rate, whether by a clear estoppel, are certainly bound by assent to the jurisdiction, for at the April term, 1870, the executors tender the copy of the will and codicil on which the issue was made up, with the affidavit of the former Clerk of the County Court to the loss of the original by burning the court-house during the war, and also the affidavit of Wisener and Brown (the executors) to the fact, and also the fact that the copy is a true copy, and show the fact to be so, because it was an officially certified copy by the Clerk, and issued to the executors on the 10th of June, 1867, a few days after its probate. And the executors then and there tender an issue on said paper, as follows: "And said executors say that said paper writing, of which the foregoing is a copy, is (or are) the last will and testament of Benjamin Brown, deceased, and this they are ready to verify." And thereupon the defendants reply and say, "the original alleged to be the last will and testament of Benjamin Brown, deceased, of which the foregoing is a *true copy*, is not the last will and testament of Benjamin Brown," and thus the issue is made up.

Now it might be far better maintained, we think, that the contestants might have insisted on the want of the original rather than the executors, for, as the

probate of the will had been set aside in the County Court, they might with some plausibility (if technical grounds are to be insisted on in such a case) have said to the executors, you are required now to prove the will of Benjamin Brown, under which you claim authority to act, and we require that you shall comply with the requirement of the law strictly, and prove the original—not a copy. They chose to make no objection, but as the executors had presented a copy of the original, with which they were satisfied, and had affirmed that the original, of which this was a copy, was the will of their testator, and thus conceded its correctness and sought the action of the Court upon the issue thus tendered, they can not now come and say the Court has erred in allowing the contest to be made on their own ground. Much of the error of the argument on this question grows out of the assumption, that the jurisdiction of the Circuit Court is appellate in cases like the present, but it is well settled that this is not correct, but that it is original. See *Patton* v. *Allison*, 7 Hum., 228.

The argument that this paper was perhaps a copy of the paper, we do not think was well taken. First, because the affidavit of Thompson, former Clerk, and of Wisener and Brown, executors, distinctly affirm that it is a copy of the will, and so the executors affirm in the issue tendered, and so the contestants affirm in their reply. It does not lie in the mouth of these parties to this record to say that this is not a copy of the original, nor can we so affirm, without dis-

carding their solemn affirmation under oath. The radical error of this argument is, that it goes on the idea that the paper is introduced as evidence, and therefore the best evidence is to be produced. No one is objecting to the correctness of the copy, or requiring the production of the original as the best evidence of the contents of the paper, but the objection is, that the Court had no jurisdiction of the cause, because only a copy is produced with the papers from the County Court, the implied admission in the objection being that the copy is correct.

It is insisted, however, that the paper was lost, and the Court of Chancery alone had jurisdiction to set up the will. The case of *Buchanan* v. *Matlock*, 8 Hump., 390, is cited for this position. It will be seen from an examination of that case that the question discussed simply whether a Court of Chancery had the power, or the County Court, to set up a suppressed or destroyed will, upon proof of its execution and of its contents. This jurisdiction is maintained unanswerably by the opinion of Judge Turley in that case; but that does not touch the question as to whether a Circuit Court may not try an issue of *devisavit vel non*, on a copy of the original, the correctness of the copy not being in dispute, but acknowledged. We may add, that it seems to us a sacrifice of the ends of justice to a mere form to require the parties to go through a tedious suit in a Court of Chancery to establish the contents of a destroyed will, when they already have a copy as accurate as the one would be when thus estab-

lished, the correctness of which is not denied. At the end of the litigation there would but be a copy at last, and probably the decree establishing the will would be based on proof of the correctness of the very copy now before the Court.

In conclusion we need but add that we can not see how his Honor can be put in error for failing to strike the case from the docket for want of jurisdiction, for want of a properly authenticated copy, or proper evidence of the loss of the original, even if this was material, when the copies and affidavits were not presented to the Court until the next term after the motion had been made. His action can only be judged by the facts before him at the time.

We have given more elaboration to the discussion than it seems to us to demand, because it has been urgently pressed on us by able counsel.

We therefore conclude there was no error in the action of the Court on this point.

The next error assigned is, that on transfer of the cause to Williamson, it seems a large number of depositions were taken to be read on the trial on the 7th of March, 1871. The plaintiffs excepted to the depositions before the cause was taken up, on the ground that the depositions had not been marked filed by the Clerk, as required by Section 3867 of the Code. The Court sustained the objection, but on the Clerk of the Court making an entry on the depositions, showing that they were handed into the office with the plaintiffs' depositions, November 23d, 1870,

but he had failed to make the entry on them at the time, the Court overruled the exceptions. There is no reversible error in this, if any at all. The depositions were in fact filed in ample time, and the fact that the Clerk failed to make the proper endorsement on them ought not to be held to prejudice the party interested in them.

The parties excepting could not have been prejudiced by the action of the Court, as they had cross-examined the witnesses, and no complaint is made of want of notice of their taking.

The next error assigned is, that plaintiffs having sworn William Brown, one of the executors, as a witness, together with Henry Brown and Mrs. Briantz (formerly Mrs. Brown), who were legatees, they were, on application of defendants, affidavit being waived, put under the rule and not allowed to hear the testimony given in the cause. The Court was asked in its discretion to allow these parties to remain and be exempt from the rule, on the ground that it was necessary they should be present with counsel during the trial.

In the case of *Rainwater* v. *Elmore*, 1 Heisk., 364, we held that it was the legal right of either party to a case before a court and jury, upon good cause shown by affidavit, to have all the witnesses against him kept out of hearing of those being examined, and apart from them after they have been examined, so that they shall not hear or know the testimony already given. We think this a sound rule, and one

we would not be willing to modify. Since parties are made competent as witnesses under our statutes, we think the reason of the rule applies with equal, if not more, force to their case than to the disinterested witness, the object being to prevent the witnesses with feelings interested from being prepared to meet the statements of witnesses already made, and to compel them to rely on their own memory for the accuracy of their statements, without being warped or influenced in their statements by what they have already heard deposed. But little inconvenience can arise from this, as prudent counsel will always be informed of the testimony to be given on their own side of the case, in advance of the trial. At any rate we do not see as much inconvenience attending the rule, as danger on the other hand of tainting the testimony which may be given by parties in interest, after hearing all that has been testified against their case by the witnesses of their opponents. We can see that no great inconvenience was felt by the counsel in this case, as Mr. Wisener, one of the executors, seems not to have been placed under the rule, by the courtesy of his brethren of the bar, and we think the case of counsel is proper exception to the rule, arising from necessity of his being in court.

The action of the Court in admitting, or rather striking out certain parts of answers and questions in depositions, and permitting balance of the answer to be read to the jury, is excepted to. In other words, to use the language of the bill of exceptions, "the

Court struck out of the deposition so much of the question as the Court deemed illegal, as well as so much of answer of witness as was deemed illegal, so as to make the question and answer agree. As to what was in the question simply, it can be of no special importance, as it is the objectionable matter in most, if not all, cases of objection to testimony. One of these questions and answer will serve to illustrate the point of the objection. After the witness had given the facts of his knowledge of and acquaintance with the testator, he was asked:

"From these facts, state in your opinion whether or not he was of sound mind and disposing memory?"

The answer is: "He was not of sound mind and disposing memory."

The Court allowed the answer, so far as the statement that he was not of sound mind, but refused to allow, and sustained the exception, as to the question of disposing memory.

The question of what shall be the form of the inquiry to the witness, and what answer may be given by him on the point of mental capacity and soundness, at the time of the execution of the paper, or at any time before or after, where it is sought to set aside the will for want of capacity to make one, has been much discussed in the Courts of the United States and England, as appears from cases cited by Mr. Redfield, note 1, 141–2. In several of the States the rule is, that witnesses familiar with the testator, after stating the change which had taken

place in his mental condition, might also declare their opinions, founded on these facts, that the testator, from defect of understanding, was incapable of making a will, and that then the jury were to judge from the facts stated by him, as to the correctness of his opinion; and we may say, that there seems much sound reason in favor of this view, for as an opinion has to be formed by men, not experts, at least, to-wit, the jury, as to capacity of the testator to make a will, it would seem that the opinion of men familiar with him, when they state the facts on which it is based, would furnish an equally sound basis for the action of the jury, as the simple statement of the facts from which a jury, unacquainted, perhaps, with the testator, are to draw their conclusions. However, the question has been settled in Tennessee, by the case of *Gibson* v. *Gibson*, 9 Yer., 332, where it was held that although the witness might answer as to whether the party was "in his senses," that is, of sound mind, yet that he could not state whether the testator was capable of making his will.

The rules laid down in that case are familiar to the profession, and need not here be repeated, farther than the one applicable to the particular class of witnesses now under consideration; that is, witnesses who are not subscribing witnesses.

The question presented in the case of *Gibson* v. *Gibson* was also discussed in the case of *Nelson* v. *Moore*, 3 Head, 482. And the principle settled by the two cases is, that when the witness had had the

means of observing the testator's capacity, manner, peculiarities or deportment, that he may give his opinion as to the soundness or unsoundness of his mind. "Such judgment," says Judge Wright, in the case quoted, "approaches to knowledge, and is knowledge, so far as the imperfections of human nature will permit knowledge of these things to be acquired, and the result thus acquired should be communicated to the jury, because they have not had the opportunities of personal observation, and because in no other way can they effectually have the benefit of the knowledge gained by observation of others."

This decision, as well as the case in 9 Yer., is based on an approval of the case of *Clay* v. *Clay*, 2 Ired., 78. In that case, as stated in Judge Wright's opinion, 3 Head, the witness had no acquaintance with the donor, except from one occurrence.

Eleven years before the execution of the deed in dispute he had visited her for the purpose of writing her will; had received her directions on the subject, and wrote it. The witness said, at this time she appeared to him to be in good health, but he thought her intellect in the state usually termed childish.

The objection to this testimony was, that it gave the opinion of the witness upon the state of the donor's mind. This was held competent by the Supreme Court of North Carolina, and as we have said, this case has been followed by this Court in the two cases cited; and we have no question of the soundness of the principle. As a matter of course, the

jury would weigh the testimony in connection with the means of observation of the witness, and his intelligence, qualifying him to form a judgment, but the evidence would clearly be competent.

Under these rules, we can see no error in the action of his Honor. The fact that the question and answers were in writing, in the form of a deposition, can make no difference in the duty of the Court to exclude from the jury an objection made, incompetent matter thus presented; nor could it authorize the Court to reject competent proof, because it was connected with that which was not competent, especially where it was readily separable, as in this case.

We come now to the objections made to the charge of his Honor to the jury. We deem it proper to say, that it is seriously objectionable in one general feature; that is, its extreme length and particularity, covering as it does, about eighteen pages. We refer to this, not as error, but as a practice that ought not to be encouraged, but reprobated by this Court. The Judge's charge to the jury should be a clear, concise statement of the principles of law applicable to the case; not an elaborate essay upon the questions presented. Such charge is better calculated to confuse and embarrass, than to direct and aid a jury in coming to their conclusion.

But passing from this to the points of objection as presented.

It is said, the Court erred in attempting to define *senile dementia*, or rather, that there is an entire

absence of a legal definition of this kind of mental capacity—the result of old age. While there is want of accuracy in the statement of his Honor, "that *senile dementia* is usually said to be the consequence of old age, and in general, exists no where else." Yet this statement is entirely immaterial, a mere remark, that could have no possible bearing on the case.

In this connection his Honor said to the jury, in telling them the effect of loss of memory, and the forgetting the names of acquaintances, etc., that these were matters to be looked to, but not as controlling the question, the great point being, whether "in conversation about his affairs with his friends and relations, he evinced sufficient knowledge of both to dispose of the former with a sound judgment." The phrase, "with sound judgment," might not be strictly accurate, if there were no further explanation of his Honor's meaning in this connection, as it might be construed to refer to the correctness, or incorrectness, or propriety of the dispositions made by him, with reference to the objects of his bounty.

But this is evidently not the sense in which the word judgment is used by his Honor, but in the sense of a sound understanding of the dispositions made. This is made clear by his subsequent statement to the jury, immediately following, and explanatory of the above remark.

He tells them substantially that the law does not look at the weakness of the body merely, nor to the

age of the testator, but to his capacity, and that he should have a competent understanding. He then tells the jury that neither old age or disease will affect the will, if he understood what he was doing, but they might be looked to by the jury in determining the question of testamentary capacity. The question being, as he says, "whether the testator at the time of making his will, knew and comprehended what he was doing." This is in accordance with the authorities, and no objection can be properly taken to it. See *Nailing*, Exr's, v. *Nailing*, 2 Sneed, 634.

The rule is thus given by Mr. Redfield, Vol 1, § 132, taken from a case in 39 Pa., St. R., 191:

Though capacity to make a will may accompany a great degree of mental imbecility, yet in order to support a will so made, it must be shown that the testator, at the time of making the will, had an intelligent consciousness of the nature and effect of his act, a knowledge of the property he possessed, and an understanding of the dispositions he intended to make." Or as perhaps more fully expressed in the case of *Beanbins* v. *Cicotte*, 11 Mich., 459, quoted in a note, p. 130, by Mr. Redfield:

"The will is not valid unless the testator not only intends, of his free will, to make such a disposition, but is also capable of knowing what he is doing, of understanding to whom he is giving his property, and in what proportions, and whom he is depriving of it."

Again, it is objected that the Court erred in his charge to the jury on the amount of undue influences necessary to invalidate the will. The particular language objected to is, that the Court said: "The influence that will destroy or vitiate a will must be such as deprives the testator of his free agency and discretion."

On looking at the charge, we find this objection is based on a fragment only, taken out of the charge, that does not by any means give the real principle laid down by his Honor on this question, for he adds, as part of the sentence, and "constrain him to do what is against his will, what he is unable to refuse, or too weak to resist, and this influence must have been exercised, and in being at the time the will was made, or so near thereto that the jury will believe the influence existed at the time, and he acted under it.

We think this statement of the law is as strong in favor of plaintiffs as could be asked, and perhaps, if objectionable at all, it is that it is full strong language against the contestants.

The next error assigned is, on the language as quoted in brief—"old age alone does not constitute testamentary disqualifications, if he has a mind capable of acting rationally, and a memory sufficient in essentials is shown to have existed, and the will is consonant with definite and settled intentions, is not unreasonable in its provisions, and has been executed with fairness. While it is true that a man

may dispose of his property as he pleases, when he is shown to have capacity, and have acted freely, and the injustice or inequality of the will is no ground on which to declare, as a matter of law, that it is invalid. Yet, as a matter of evidence, such a fact as the injustice and unreasonableness of the provisions of a will may well be looked to, to arrive at the question, as to whether the will was or was not the result of fraud or undue influence, and not the dictates of the free act of the testator's own mind.

The rule is thus given by Swinburne, as cited by Mr. Redfield, Vol. 1, 520–52:

"It is certain Courts can not assume to measure, and to guard against any species of influence which may be brought upon the testator, to give his property in a particular direction. It is only that influence which deprives the testator of his free agency, and makes the will more the act of others than of himself, which will avoid it. Hence, any thing in the character of the will which renders it contrary to natural affection, or what the civil law writers denominate an undutiful testament, as where children or others entitled to the estate, in case of intestacy, are wholly disinherited; or if not wholly deprived of a share, it is given in such unequal portions as to indicate that it is due without any just cause, and wholly dependent on caprice, or over-persuasion, or deception, it must always excite apprehension of undue influence at the very least. This principle," adds Mr. Redfield, "does not include the idea, however,

that a testator has not the right to disinherit his children, even upon any ground satisfactory to himself. We think the weight of authority and sound principles are clearly in favor of the proposition we have laid down. See authorities cited by Redfield, Vol. 1, p. 374, §§ 14, 515, 517, note 22; *Kevill* v. *Kevill;* Court of Appeals; Ky. Law Reg., 6, 80.

On looking at the part of the charge cited, it will be seen that his Honor was giving the jury instructions on the question of the presumption of knowledge of the contents of the will by the testator, as well as the question of capacity or incapacity to make, as infirmity, old age, and defect of memory, and in this view the principle is, we think, strictly correct. It is quoted from Mr. Redfield, Vol. 1, p. 98, who cites it, with approval, from a New York case; *Maverick* v. *Reynolds*, 1 Redf., same Reps., 360.

The next one assigned is, that his Honor charged: "If the jury find from the proof that the will was not read to the testator, and he is illiterate, it must be shown that he knew its contents. This may be done by circumstances, as well as by direct proof. If he be illiterate, old, and diseased, it requires full and satisfactory proof that he knew the contents of the will."

The latter clause of the charge is especially objected to, and it is urged that this stringent rule only applies to cases where the draftsman takes a benefit under the paper. In cases of *Cox* v. *Cox*,

4 Sneed, 87, while the general rule is recognized, that in ordinary cases, where the testator is shown to be of competent capacity, the presumption of law would be, from his signing the paper, that he knew its contents. "But in cases of doubtful capacity, and where the testator is blind, or unable to read, more is required than the mere legal presumption, arising from the act of execution. In such cases, there must be proof, not only of formal execution of the will, but likewise of the testator's knowledge of its contents."

In this case, the draftsman was a subscribing witness, but took no interest under the will. We think the rule sound and approve it, and his Honor's charge conforms to the principle laid down. It is proper to remark, that the proof shows the testator to have been very old—upwards of 80—diseased, infirm, and unable to write his name.

It is next objected, that the Court erred in telling the jury that if the will was obtained by undue influence, it can not stand or be set up as a will; that it is void entirely, not only as to the persons obtaining it, but to all others.

While it might be conceded, that in some cases a will might be good in part and void in part, though we do not say how this may be, yet there is no error in the charge given by his Honor, as it is applicable to the whole will, and it must be admitted, that if the whole instrument were obtained by fraud or undue influence, it is not the

will of the testator, but of others, and ought not to stand. We can not speculate what would have been a testator's will, if left free to the dictates of his own judgment in such cases.

The plaintiff introduced and proposed to examine Mrs. Elizabeth Brinty, the wife of Benjamin Brown, who, since his death, had intermarried with Dr. Brinty. The record says she was offered as a witness "in support of the will." She was objected to by the contestants as incompetent, and the exception sustained. On the issue presented, as to whether the will had been obtained by fraud or undue influence, exerted by her over the old man in his lifetime, and after her marriage she was clearly incompetent, under repeated holdings of this Court. And so as to the question of soundness of mind, or capacity to make a will, she was equally incompetent, as she would be compelled to speak of the transactions and conduct coming under her observation by virtue of the marital relaton, and what occurred between husband and wife.

The principle on which we have uniformly ruled on this question is, that public policy, as well as a proper sense of propriety and regard for the confidences incident to the marriage relation, forbid that the wife, after the death of the husband, should be called on, or permitted to divulge in Court, the matters confided to her, or that came to her knowledge under the said trust involved in the marriage contract. This is in accordance with the principle of

the case, *Brewer* v. *Furgerson*, 11 Hum., 567, and we do not feel inclined to depart from it. If the party had sought to prove any matter occurring after the marriage, or any matter not within the rule, it should have been so presented to the Court; but as the facts appear in this record, we can see no error in the action of the Court on this point.

On the trial of the case, the plaintiffs produced a photograph, purporting to be a likeness of Benjamin Brown, the testator, which, on objection, was excluded from the jury. This is now assigned as error. We can see no principle on which it could have been relevant to the issue. There was no question of the identity of the deceased, nor could the picture presented, however accurate a likeness it might be, have thrown any light on the questions in issue, as to whether he was capable of making a will, nor whether it was obtained by fraud or undue influence. There was no error in this.

Lastly, it is insisted that there is no evidence to support the verdict, and that a new trial ought to have been granted for this cause. We can not undertake to go over in this opinion the immense mass of testimony presented on the part of each party bearing on the issues presented, and critically examine it. It suffices to say, that on the part of the contestants, there was a large amount of testimony tending to show that the old man was in his second childhood; that his memory had failed him; that his conversation was disconnected and flighty; in a word,

that he was weak, very weak, both in body and mind. There was testimony tending to show that his young wife controlled him as a child; that he but did her bidding.

The proof shows that at the time of their marriage she could not have been more than about 25 or 27 years old, young, strong, vigorous, energetic, and probably, or we think certainly, married the old man in view of his property, and certainly for nothing else. It further shows, that he was about 80 years of age when she formed this most unnatural alliance with him, and that he was coarse, vulgar, illiterate, slovenly, and dirty in his habits, notoriously a miser, and certainly altogether unattractive in person and habits. (From all the facts, we think it clear, beyond all question, that a young and respectable woman, in the prime and vigor of her maidenhood, sacrificed all her finer feelings, and sold herself for money, into a most unnatural alliance.)

Under such circumstances, we can not say the jury were not warranted in saying she would not likely have been thwarted of her purpose, and had obtained the will we find in this record. She evidently had the desire to secure his property, she had the means of attaining her end, if contestants are to be believed, and in the will we see the end attained. In a word, we can not say there is not much evidence on which the verdict may well be supported.

It is true, on the other hand, that the parties seeking to sustain the will have introduced a large

mass of testimony in favor of the opposite of the propositions we have above presented so much, that if the jury had found a verdict in favor of the will, we can not say we would have been certainly justified, under well settled rules, in setting aside such a verdict. But in such a case, it was the province of the jury to settle the weight of the testimony, and on which side was the preponderance. They have done so, and the Court below has refused a new trial, and we can not say that in this there is reversible error.

We therefore conclude that the judgment of the Court below must be affirmed.

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TURNEY, J., delivered the dissenting opinion.

Some time in the year 1857, writings purporting to be the last will and testament, and codicil thereto, of Benjamin Brown, were admitted to probate in common form in the County Court of Bedford County. On the 5th day of July, 1859, Robert Brown and Robert C. Maupin and wife filed their petition in said Court, alleging . . . . that "the writing was not the last will and testament of Benj. Brown; that the same was obtained by fraud and undue influence. That Benj. Brown was *non compos mentis* at the time of the execution of the will; that he was imbecile and totally incompetent of making a will, and that the same lacks the legal requirements;" and praying . . . . that "the

probate in common form be set aside and recalled, and the will certified to the Circuit Court of Bedford County, where the same may be *probated* in solemn form, and its validity tested in an issue *devisavit vel non;*" concluding, "a copy of the will is herewith tendered."

On the 6th of July, 1869, the County Court made an order in the following words: "This cause came to be heard this 6th day of July, 1869, upon the petition of Robert S. Brown and Robert C. Maupin and wife, *and a copy of a paper purporting to be the last will of Benjamin Brown* being filed as part of the petition for the petitioners, and the answer of Wm. H. Wisener, Sr., and Wm. Brown, executors of Benjamin Brown. And it appearing that a paper writing purporting to be the last will and testament of Benjamin Brown, deceased, in which said Wisener and Brown are named as executors, was admitted to probate in common form at the ——— term, 1857, of this Court, and that said probate is now set aside on the petition of said Brown and Maupin, that they may contest the will in the Circuit Court of Bedford County. It is ordered by the Court that this cause be certified to the Circuit Court of Bedford County, when a trial may be had on an issue *devisavit vel non,*" etc., etc.

On the 15th day of July, 1869, the Clerk of the County Court filed with the Clerk of the Circuit Court a copy of the proceedings in the County Court, consisting of a copy of the petition, including a copy

of the paper purporting to be the will, answer, bonds and decree, the certificate indicating the papers constituting the transcript.

On the 6th of January, 1870, the executors moved the Circuit Court to strike the cause from the docket for want of jurisdiction, which motion was discharged. And thereupon "the defendants moved the Court to compel the executors to *probate* in solemn form the alleged will of Benjamin Brown, deceased, and make up the issue of *devisavit vel non*, and thereupon the executors moved the Court for a *certiorari* to the County Court Clerk to certify the will and records *probated* in this cause, which is accordingly done."

No *certiorari* is shown to have issued.

On the 5th day of April, 1870, before "J. M. Phillips, Clerk," "Joseph H. Thompson makes oath that he was Clerk of the County Court of Bedford County at the time the last will and testament of Benjamin Brown, deceased, was admitted to probate in common form in said County Court, and that as such he was the keeper and proper custodian of the records of said Court, including original wills and the probate and record of the same. That as such he *learned* the court-house of Bedford County was destroyed by fire in the month of March, 1863, or about that time, that the office of the Clerk of the County Court was kept in a room in said building, in which room all the records were kept, and that *most of the records* of said Court were destroyed, and among these thus destroyed was the desk containing

the records of wills and the files of original wills, and that he *verily believed* the original will of said Benjamin Brown and the records thereof were destroyed by said fire; he has *never seen either* since; he was Clerk when said will was proved in 1857, and continuously up to 1868. He further states that the certified copy of the said will and codicil included or mentioned in the issue in this case, purporting to be signed by him on the 10th day of June, 1857, is a true copy of said will and codicil, all in his own proper hand-writing."

We find in the record this paper:

"William Brown and W. H. Wisener, the executors named in the will and codicil of Benj. Brown, deceased, after it was produced to the County Court and proved in said Court, they *believe* it was destroyed with its record by the fire which consumed the court-house in Shelbyville in March, 1863. The copy produced was obtained by Wm. H. Wisener, Sr., immediately after the probate of the will. [Signed]

"WILLIAM BROWN,

"W. H. WISENER."

"Sworn to and subscribed before me, April 5th, 1870. "J. M. PHILLIPS, Clerk."

Under the orders of the Court of the 6th of January, 1876, the executors bring into Court the copy, and file the following declaration, viz.:

"And said executors say that said paper writing, of which the foregoing is a copy, is (or are) the

last will and testament and codicil thereto of said Benjamin Brown, deceased, and this they are ready to verify."

To this are the usual pleas and issue thereon.

In this state of the Record, did the Circuit Court have jurisdiction to try the validity of the will? I think not. Admitting it to be a well-settled rule in this State that parties may by consent go to trial of an issue *devisavit vel non* upon a copy of the will, it is clear no such consent was given by the executors in this case.

On the contrary, we find them at the outset moving to strike the cause from the docket for want of jurisdiction. Then if a trial is to be had under the rules of law and practice, have these rules been conformed to?

By Section 2173 of the Code it is provided: "And when the validity of any last will or testament, written or nuncupative, is contested, the County Court shall cause the fact to be certified to the Circuit Court, and send to said Court the *original* will," etc., etc.

By Section 2179: "If the original will be lost or mislaid, so that it can not be produced on the trial of the issue, but the *paper* has been copied into the pleading or spread upon the minutes of the Court, the Court may proceed with the trial of the issue in the same manner as if the original were in existence and before it."

It is readily seen that the section first cited con-

templates no loss or mislaying of the paper while in the custody of the County Court or its officers, and makes no provision for such contingency.

It is as readily understood, the last section quoted has in view only the loss or mislaying after the paper has been sent to the Circuit Court. In this section are to be found the only instances in which the issue attempted to be presented here can be tried upon an abstract copy of the will in the absence of consent.

The fact that the copy had been inserted in the pleadings or been spread upon the minutes of the Court, made it a part of the Record of the Court, as well as of the cause, at a time when the original was in existence and could not be detached from, by omission, mistake or improper addition. Hence, the reason of the Legislature, for the passage of the law.

But it is insisted the original had been destroyed with the record of its probate by fire, and therefore a certified copy is the best and only secondary evidence.

To the assumption of destruction by fire, I answer we do not know legitimately from this Record that the court-house or the records in it were burned; true we find a paper purporting to be the affidavit of the Clerk of the County Court, but there is nothing connecting it with or identifying it as a part of the Record; it has no evidence upon it of ever having been filed, nor is it shown why, under what circumstances, nor whether in or out of term time it

was made. It is sworn to before "J. M. Phillips, Clerk," without more, is, as far as we can see, voluntary and *ex parte*, and so of the affidavit of Wisener and Brown.

Suppose, however, we treat them as regular in manner, they are wholly wanting in substance. They show no evidence of such, and merely give the belief of affiants; the affidavits of the former Clerk only showing that he had learned, not that he knew of the burning of the court-house; but even were they perfect in substantial respects, it must be remembered that for about two years before they were made, Thompson had ceased to be the Clerk, and another had become the custodian of the records of the County Court, from whom we heard nothing. Beyond these defects is a more fatal objection still.

The copy called "a certified copy," but which is not as it appears in the Record, is not, though it were certified, the best secondary evidence, the original being burnt. That copy is the individual, private property of the executors, furnished by the Clerk for their guidance in the administration of the estate, and has nothing of the solemnity of a record promoting the purpose of this proceeding.

After the destruction of the original will, and the record of its probate and registration, the best evidence in this issue would have been the supplied record of such probate and registration because of its solemnity and more inviolable repository, in procuring

which a preserved copy of the will, sufficiently identified, would be competent evidence.

The Circuit Court had no jurisdiction to supply the loss of the original will, it never having been filed in that Court. Code, 3097.

The motion to strike from the docket, in my opinion, was well taken. The proceedings of the County and Circuit Court should be dismissed without prejudice. I am further of opinion the statement of facts by some of the witnesses was entirely too meagre to authorize an expression of opinion as to the capacity of the testator.

John Moran *v.* The Nashville & Chattanooga Railroad Co.

# JOHN MORAN *v.* THE NASHVILLE & CHATTANOOGA RAILROAD COMPANY.

1. RAILROAD. *Damages. Negligence.* The accident occurred in the company's yard. The following charge is held to be substantially correct: "It is the duty of the engineer to keep a lookout ahead, but not behind, and if he rang the bell or sounded the whistle at the crossing of the street, and there was nothing on the track ahead, he was not required to continue ringing the bell and sounding the whistle. If the plaintiff was on the track where he could be seen, all possible means should have been used to stop the train, but if the plaintiff was concealed, it was not negligence to omit to sound the whistle or ring the bell.
2. SAME. *Same. Charge of Court on measure of damages.* No reversal can be had because the Court below failed altogether to charge the jury upon the measure of damages, when the defendant is found not to be liable at all.

FROM DAVIDSON.

Appeal from the Circuit Court. NATHANIEL BAXTER, Judge.

M. M. BRIEN, Jr., for Moran.

BATE & WILLIAMS for the Nashville and Chattanooga Railroad Company.

MCFARLAND, J., delivered the opinion of the Court.

Moran brought this action to recover damages for a personal injury by which he lost an arm. Failing below, he has appealed in error to this Court.

The facts, detailed principally by the plaintiff him-

self, are in substance as follows: The plaintiff, who was a workman in a shop near the depot of the defendant, at Nashville, having been to the city to vote, or get a certificate to vote, had left his tools behind some stationary cars along the track of the road. Before going to dinner, he went to get his tools. After getting his tools he placed his hands upon the head-bars of two of the stationary cars, and leaped over on the next or main track. As he set his foot on the track he saw the pilot of an engine and drew back immediately, and was struck either by the tender or next car before he had time to recover. He heard no whistle or bell. The place where the accident occurred was in the yard of the railroad company. At the point there were four parallel tracks, the one on which stood the stationary cars from between which the plaintiff leaped next the track on which the train was moving, and then beyond two other tracks, upon which were also stationary cars. The point was about forty or fifty yards from the crossing of Church street. The train was a "switch train;" it gave the signal at the crossing of Church street, but did not afterwards; it was not customary to do so. There was no other crossing for some distance. The train was moving ten or twelve miles per hour, the usual rate being from three to eleven miles per hour. The engineer was on the lookout, but did not see Moran.

The Circuit Judge's charge presented to the jury principally the question as to whose negligence caused

the injury. Yet, in substance, he instructed the jury that the provisions of the statute for the prevention of accidents on railroads was applicable.

He says: "If there was an engineer on the engine, it was his duty to keep a lookout ahead, but not behind. I think that would be a compliance with the requirements of the statute, and if he rang the bell and sounded the whistle at the crossing of the street, and there was nothing on the track ahead of it, he was not required by the statute to continue ringing the bell or sounding the whistle all the way it went. If the plaintiff was on the track where he could be seen, it would then have been the duty of the defendant to have given the alarm and put down the brakes, and to have used all other possible means to stop the train. But if the plaintiff was not on the track, but was concealed among the stationary cars, so that he could not be seen by the engineer, it was not negligence to omit to sound the bell or whistle."

No more special instructions were asked for upon this subject, and the plaintiff had the benefit of all the provisions of the statute applicable, and he did not request any further charge on the subject. We are aware of no provision applicable to the facts of the case, not given in the charge.

It is objected that the Judge failed altogether to charge the jury upon the measure of damages. As the jury have found the defendant not liable at all, we can not reverse for this omission.

The charge of the Court upon the question of negligence, we think, was substantially correct; in fact, we do not see the proof upon which it can be said that the accident was attributable to the defendant's negligence. The train was being run in the ordinary way, not omitting any statutory precautions. Reasonable prudence upon the part of the plaintiff would have saved him from the calamity, and we think that in legal contemplation the accident must be attributable to his own negligence.

Affirm the judgment.

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## Louisville & Nashville Railroad Company *v.* Mary Conner, Administratrix, *et al.*

1. Railroad. *Contributory negligence. Damages.* In a suit for damages against a railroad company for loss of life occasioned by one of its trains, the condition and conduct, the carelessness, recklessness, and the imprudence of the deceased may be considered by the jury in assessing direct pecuniary damages resulting to the party from the injury.

Cases cited and qualified: L. & N. R. R. Co. *v.* Robinson, 9 Heis., 276; L. & N. R. R. Co. *v.* Burke, 6 Cold., 51; Smith *v.* N. & C. R. R. Co., 6 Cold., 592; Prince *v.* N. & C. R. R. Co., 2 Heis., 587; N. & C. R. R. Co. *v.* Carrol, 6 Heis., 347; Code, § 1166, Sub. Sec. 5.

Louisville & Nashville Railroad Co. *v.* Mary Connor, Adm'x, *et al.*

2. CASE OVERRULED. So much of the case of the L. & N. R. R. Co. *v.* Burke is overruled as applies to the right of an administrator of a person instantly killed, to sue for the use of the wife and children of the deceased, but the overruling is expressly confined to that single point.

FROM DAVIDSON.

Appeal from the Circuit Court. EUGENE CARY, Judge.

GUILD & SMITH and EAST & SPURLOCK for the Company.

W. G. & JOHN D. BRIEN and JOHN C. GAUT for Mary Conner.

NICHOLSON, C. J., delivered the opinion of the Court.

Mary Conner, administratrix, etc., instituted this suit in 1866, in the Davidson County Circuit Court, against the L. & N. R. R. Co., to recover damages for carelessly and negligently running their cars, locomotives, etc., over and killing Michael Conner, her husband.

Upon the trial of the cause the jury found a verdict in favor of the plaintiff for $4,000. The defendants have appealed.

A general statement of the facts of the case will be sufficient to present the questions of law involved:

It appears that in July, 1864, Michael Conner was killed by an engine running over him, as it

was backing from the depot of the L. & N. R. R. Co., in Nashville, to the round-house, in Edgefield. He was killed instantly, on the L. & N. R. R., about 60 or 70 yards from the White's Creek Turnpike bridge, and on the north side of the bridge. Two witnesses say they first saw Conner on the Nashville side of the Cumberland river. Showing his pass to the pickets, he passed on in advance of witnesses, some 60 or 70 steps. If he was drinking witnesses did not notice it. They did not hear the bell or whistle until after the engine passed over Conner's body. They did not see him stagger; they were walking behind him, 40 or 50 yards, looking at him, and if he had staggered, they would have seen it. Had known him seven or eight years, and never saw him drunk. The railroad bridge was the only way for passengers, at the time, either on foot or in vehicles. Witnesses did not hear the engine coming until it was almost on them. It was going very rapidly, as fast as a fast horse could run. An engine running rapidly might be heard for a mile, yet they did not hear it. It might have been on account of the rattling of the wagons on the square in Nashville. The engine went on to the round-house. Conner lived beyond the round-house, about 90 yards. He was a hard-working, industrious man, and supported his family.

Defendants introduced three witnesses, who proved that Conner was very drunk when he came from Nashville; was drunk when he went there. When

he returned, he came on the side of the track, staggering along, and staggered from one side of the road to the other. When the engine was coming over from Nashville, they blew the whistle and rang the bell, and at the time the engine was approaching him, he was on the side track, and staggered on to the main track, just as the engine was passing, and was run over. At the time of the accident, witnesses were not more than five or six rods from where it occurred.

Three other witnesses proved that Conner was a habitual drunkard—did not work or do any thing for the support of his family. Other witnesses proved that Conner had some property, and traded in cattle.

The first error relied on is based on that portion of the charge of the Court, in which it was assumed that Section 1166, Sub. Sec. 5, of the Code, was intended to be applicable to the movement of a locomotive or engine, about the depot, when detached from a train of cars, or from a depot to the engine-house in the vicinity. This question arose in the case of the *Louisville and Nashville R. R. Co.* v. *Robinson*, decided at Jackson, in which case an employee of the company was killed in the yard of the Company, by the backing of an engine into the engine-house. It was held that as between the Company and one of its employees, engaged in his duties in the yard, the

provisions of the Section referred to were not intended to be applicable, but as between the Company and a stranger, so killed, no decision was made. Nor do the facts in proof here raise the question which has been argued.

It is not shown that this accident occurred within the yard of the Company; nor indeed, does the proof inform us where the depot of the Company was, or how far from the round-house the accident occurred. The localities are so imperfectly stated that we can not assume that the accident occurred within the yard of the Company, or that the engine was backed into the round-house to be left there; for one witness speaks of its having made at least one trip from and to Nashville from the time Conner went into Nashville until his return. On this question, therefore, in the absence of more satisfactory proof, we can not undertake to determine, but presume that the Circuit Judge was correct in his application of the provisions of Sec. 1166 to the facts of the case.

It is next insisted that the Circuit Judge erred in his instructions to the jury on the subject of contributory negligence. The Court was asked to charge the jury that if the deceased came to his death by or through his own carelessness, or even if his own carelessness conjoined with that of the Company, and this accident the result, that then the plaintiff could not recover. He responded that but for the provisions of our Statutes, as they now stand, he would feel it his duty to instruct the jury to inquire as to

how far the carelessness, or imprudence, or condition of the deceased contributed to the fatal result.

"But the law, as it now stands, says that the Company shall be responsible for all damages to person or property, occasioned by or resulting from any accident or collision that may occur, when the precaution prescribed shall not have been observed."

And further: "If you shall find the issues for the plaintiff, you will then proceed to assess the damages, and will return a verdict for such sum as you shall deem just and proper under all the circumstances of the case as proved, (not exceeding the amount sued for), and considering the character of the deceased, his habits and situation in life, his age and the relations which he sustained to this plaintiff and her children, as husband and father."

And again: "You may look to the conduct of the Company's agents at the time of the accident, to see whether there was connected with it any circumstances of aggravation, etc., with the view of assessing exemplary damages. And when considering this question of exemplary damages, it would be proper for the jury to take into consideration the condition of the deceased at the time of the accident, and as to how far his condition and conduct, his carelessness, recklessness and imprudence contributed to the result. But remember you are not to consider these facts in fixing the liability of the Company, or in assessing the direct pecuniary damages resulting to the party from the injury sustained, for as to them

the Statute makes the Company fully liable, when liable at all."

This charge, so far as it holds that the condition and conduct, the carelessness, recklessness and imprudence of the deceased, are not to be considered by the jury in assessing the direct pecuniary damages resulting to the party from the injury, was erroneous. It was held in the case of the *Louisville and Nashville R. R. Co.* v. *Burke,* 6 Cold., 51, that the "negligence of the person injured, which caused or contributed to cause the accident or collision, or without which the accident or collision would not have occurred, may be taken into consideration by the jury in determining the amount of the damages proper to be given for the injury. Such construction the clauses of the Code will bear, and must be given."

It is true, that in the case of *Smith* v. *Nashville and Chattanooga R. R. Co.*, 6 Cold., 592, the Court seem to have placed a different construction upon the Sections of the Code construed in the case of the *Louisville and Nashville R. R. Co.* v. *Burke.* But we can not concur in the construction of these Sections, so far as it conflicts with that of the case of the *Louisville and Nashville R. R. Co.* v. *Burke.*

In the case of *Prince* v. *Nashville and Chattanooga R. R. Co.*, 2 Heis., 587, this Court overruled so much of the case of the *Louisville and Nashville R. R. Co.* v. *Burke* as related to the right of an administrator of a person instantly killed to sue for the

use of the wife and children of the deceased, but the overruling was expressly confined to that single point.

In the case of the *Nashville and Chattanooga R. R. Co.* v. *Carroll,* not yet published, delivered at Knoxville, this question was elaborately examined, and the rule adhered to, that if the injury was the result of the negligence of the deceased, or if he could have avoided the injury by ordinary care, the jury might look to these facts in assessing the damages.

It follows that for the error indicated the judgment is reversed.

S. H. Miller, Adm'r, *v.* M. R. Buchanan.

NASHVILLE,.....DECEMBER TERM, 1873.

## S. H. Miller, Adm'r, *v.* M. R. Buchanan.

Sale of land. *Redemption. Debtor. Purchaser. Rents.* Where land has been sold, subject to redemption, and the debtor allowed by the purchaser to remain in possession under an agreement to pay rents, the same may be recovered if the debtor fails to redeem.

Cases cited and discussed: Kannon *v.* Pillow, 7 Hum., 281, 293; O'Donnell *v.* McMurdie, 6 Hum., 134.

Code cited: § 2135.

Statute cited: Act of 1849–50, ch. 121

FROM RUTHERFORD.

Appeal from the Circuit Court. W. H. Williamson, Judge.

Palmer & Richardson and E. D. Hancock for Miller.

H. P. Keeble for Buchanan.

McFarland, J., delivered the opinion of the Court.

Buchanan's land was sold, subject to redemption, by a trustee, under a deed of trust, on the 27th of October, 1868, and was purchased by S. H. Miller and Benjamin Baty. Buchanan was, at the time, in possession, and so remained until after the expiration

of the time for redemption. The purchase-money was not all paid at the time, and the trustee did not make a deed to the purchaser until the 25th of July, 1871. The land was not redeemed.

This action was brought by the purchaser to recover $500, which it is alleged was due by special contract, made about the latter part of the year 1869, between one of the purchasers and Buchanan, by which the latter agreed to pay this sum for the use or rent of the land for the year 1870. There was conflict in the proof, as to whether, in fact, this agreement was made, but the charge of the Circuit Judge was conclusive of the case, and rendered the determination of this question of fact unnecessary. He told the jury that "if the purchaser fails to take a deed, and waits until the time of redemption has expired, he has no right to demand possession in the time intervening between the date of the sale and the termination of the two years for redemption, and a contract for rent in such case is without consideration."

The question for our determination is the correctness of this charge. Previous to the Act of 1849–50, chapter 121, we understand the law to have been, that if the purchaser went into possession with a deed and held during the two years allowed for redemption, the right of the debtor was simply to redeem by buying the debt and interest, and upon doing this he acquired no right to hold the purchaser liable for rents during the two years he had been in possession. The law regarded the purchaser as having

been the absolute owner during the two years. This was so held in the case of *Kannon* v. *Pillow*, 7 Hum., 281.

In the case of *O'Donnel* v. *McMurdie*, 6 Hum., 134, the purchaser did not take a deed, nor did he demand or obtain the possession, but the debtor was allowed to remain in possession, and he redeemed the land by the expiration of the two years. The action was brought by the purchaser for the rent during the two years. It was held upon these facts that the relation of landlord and tenant did not exist between the purchaser and the debtor, and that the former could not recover rents of the latter in the absence of an express agreement to pay rents. This was the state of the law when the Act of 1849–50 was passed (Code, § 2135, which enacted that "the debtor permitted to remain in possession shall not be liable for rent from the date of the sale to the time of redemption. And if the purchaser or his assignee take possession under his purchase, upon redemption by the debtor, he shall have a credit for fair rent of the premises during the time they were in the purchaser's possession."

So that under this law, if the debtor was permitted by the purchaser to remain in possession during the two years, the former received the benefit of the rents, whether the land was redeemed or not. on the other hand, if the purchaser went into possession during the two years, he obtained thereby the benefit of the rents during the two years, provided

the debtor did not redeem; but if the debtor did redeem, the purchaser would have to account for the rents. The question then is, upon this state of the law, if the debtor agree to pay the purchaser rents for the land during the two years, is the agreement supported by a sufficient consideration?

It may be conceded, for the argument, that the purchaser not having taken a deed and contracted for rent, could not maintain the common law action of debt for rent in the strict technical sense. But he might maintain an action upon the contract if supported by a sufficient consideration. What right did the purchasers have which they could surrender to the debtor in consideration of his promise to pay this sum of money. They had the right to the immediate possesion, and to have a deed for the same. It is true they would take possession and receive the rents, liable in one contingency to account to the debtor for their value. In the other contingency they would receive and retain the rents absolutely. The debtor, on the other hand, if permitted to retain possession, would receive the rents in any event. If, however, he surrendered possession to the purchaser, and afterwards redeemed the land, the latter would be liable to him for the rents, and we suppose if by agreement he paid rents to the purchaser and afterwards redeemed, the same result would follow. So that if the purchasers agree not to avail themselves of their right to immediate possession, in consideration of a promise of the debtors to pay a sum agreed upon as rents, by this

agreement the purchasers estop themselves from exercising or attempting to exercise a right which they clearly had, and the debtor becomes entitled absolutely to the possession as against the purchaser, whereas without this agreement he was subject to the will of the purchaser.

If the debtor should in fact surrender possession to the purchaser and then rent from him, we think there could be no question as to his liability. And an absolute agreement to pay rents in consideration of being allowed to remain in possession must be, in effect, the same thing. The case of *Sheratts* v. *Fourtine*, reported in a note to *Kannon* v. *Pillow*, 7 Hum., 293, is relied upon by defendant's counsel. That case was long previous to the Act of 1849–50, and previous to the cases of *O'Donnell v. McMurdie*, 6 Hum., 134, and *Kannon* v. *Pillow*, 7 Hum. In the latter case Judge Turley said the Court was strongly inclined to the opinion that *Sheratts* v. *Fourtine* were improperly decided. The opinion of Judge Peck is certainly in conflict with the other cases.

We are of opinion the charge of the Circuit Judge is erroneous, and for this the judgment is remanded and a new trial awarded.

Prettyman Puckett *v.* James Draper.

# PRETTYMAN PUCKETT *v.* JAMES DRAPER.

WARRANTY TITLE. *Upon failure of. Vendee's relief. Chancery jurisdiction.* Where land is purchased and a bond for title taken with general warranty, the vendor being insolvent and unable to make title, the vendee may, by bill in Chancery, have the contract rescinded, and collection of the notes for purchase-money enjoined.

Cases cited: Buchanan *v.* Alwell, 8 Hum., 516; Barnett *v.* Clark, 5 Sneed, 435.

FROM PUTNAM.

Appeal from the Chancery Court. B. M. TILLMAN, Chancellor.

JOHN P. MURRAY for Puckett.

ROBT. A. COX for Draper.

DEADERICK, J., delivered the opinion of the Court.

The bill in this case was filed on the 7th of September, 1868, in the Chancery Court at Cookville. It alleges that defendant had obtained a judgment against complainant on a note of $200, before a Justice of the Peace, from which judgment complainant had appealed to the Circuit Court of Putnam county, where the cause was then pending. That the note was for a tract of land of one hundred and one acres, partly in DeKalb county and partly in Putnam, the defendant binding himself in a bond for title to make or cause

to be made a good warranty title to said Puckett upon the payment of said note. The title bond is exhibited with complainant's bill. The bill charges that said Draper had no title to said land, and never had any right to said land; that the sale of the complainant was fraudulent, and should be rescinded. The bill further charges that Draper is insolvent, and that if he is permitted to collect the note at law, complainant will be without remedy.

The bill prays that the suit at law be perpetually enjoined, and the sale of the land rescinded. The defendant demurred to the bill, and the demurrer was sustained and the bill dismissed, and complainant appealed to this Court.

The grounds of demurrer are:

1. That the bill does not allege that the defendant bound himself in his title bond "to cause" the title to be made, etc., but simply alleges that he bound himself to make the title, whereas the title bond, which is exhibited with the bill, stipulates that defendant is bound to make, or cause to be made, a title, etc.

The defect in the bill is the omission of the allegation that defendant was bound to "cause to be made," etc.

2. That the complainant may plead and rely upon the defence at law that there was no consideration for the note, and that his remedy at law is unembarrassed.

We are of opinion that the allegations of the bill negative the ability of complainant to make or cause to be made a "good warranty title," alleging, as it does,

that he has no right or title to the land sold. And that the complainant has not an unembarrassed remedy at law. The bill prays for a perpetual injunction against the prosecution of the suit, and a rescision of the contract of sale of the land, and upon the allegations of the bill being sustained by proof, complainant is entitled to this relief. 5 Sneed, 435; 8 Hum., 516.

The decree of the Chancellor sustaining the demurrer and dismissing the bill is erroneous and is reversed, and the cause will be remanded to the Chancery Court for answer and further proceedings. The costs of this Court will be paid by defendant.

## R. T. Tompkins *v.* Thos. W. Lillard *et al.*

1. Chancery practice. *Judgment by motion. Enforcement of sale notes.* Where judgment by motion is had in the Chancery Court on notes executed for land sold under its decree, objection to the enforcement of such notes must be taken by petition in the cause or by original bill, and not upon appeal from the judgment on the notes.
2. Same. *Same. Recitals of judgments.* The notes were payable to J. M. Tompkins, special commissioner; the judgments were rendered in the name of R. T. Tompkins, but recite upon their face that J. M. Tompkins was dead, and that R. T. Tompkins had been appointed in his place.

*Held*, The judgments are sufficient.

FROM RUTHERFORD.

Appeal from the Chancery Court. A. S. Marks, Chancellor.

R. T. Tompkins *v.* Thos. W. Lillard *et al.*

[No brief appears for Tompkins.]

B. F. LILLARD for Lillard *et al.*

NICHOLSON, C. J., delivered the opinion of the Court.

This is an appeal from a judgment by motion in the Chancery Court at Murfreesboro, on notes executed for land sold under decree of that Court. No petition or bill was filed resisting the judgment or to set the same aside after its rendition, but an appeal taken to this Court from the judgment. It is now said that there are various irregularities in the proceedings prior to the decree of sale, on account of which the purchaser's title will be defective. It is the established practice that objections to the enforcement of sale notes like these, must be taken by petition in the cause, or by original bill, and not upon appeal from the judgments on the notes. This appeal brings up nothing but the sufficiency of the judgments, and this must be determined by the recitals contained on its face.

It is next said that J. M. Tompkins was special commissioner when the land was sold, and that the notes were payable to him as such; yet, that the judgments were rendered in the name of R. T. Tompkins, special commissioner, etc. It is recited on the face of the judgment that J. M. Tompkins had died, and that R. T. Tompkins had been appointed in his place. This recital is conclusive and renders the judgment in the name of R. T. Tompkins unex-

ceptionable. We find the recitals in the judgment full and complete, fully warranting the judgment rendered. There is no error and the judgment is affirmed.

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THOS. A. JONES *v.* J. H. BLACKBURN and W. L. HATHAWAY.

BILLS AND NOTES. *Lost note. Affidavit must be made. When.* Where suit is brought upon a lost note the affidavit must be made in the Court in which the suit is instituted, under Section 3901 of the Code.

Code cited: § 3901.

Statute cited: Act of 1819.

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FROM DEKALB.

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Appeal from the Circuit Court. ANDREW MCCLAINE, Judge.

J. A. & R. C. NESMITH for Blackburn.

GOLLADAY & FORD for Thos. A. Jones.

DEADERICK, J., delivered the opinion of the Court.

This is an action brought in the Circuit Court of DeKalb County upon a lost note. The affidavit was

made by plaintiff before a Justice of the Peace of *Knox* County, and the objection taken that it should have been made before the Court in which the suit was brought. The objection was sustained and the verdict and judgment were for defendants, and plaintiff has appealed to this Court.

Under the Act of 1819 this Court has held that the affidavit should be made in the Court in which the suit is brought, and although the language of the Code (§ 3901) is not identical with that of the Act of 1819, it is nevertheless considered the proper practice to require that, in this respect, the same construction shall be given to the present statute as has heretofore prevailed as to the Act of 1819.

The judgment of the Circuit Court will be affirmed.

James Allen *v.* James H. Wood *et al.*

## JAMES ALLEN *v.* JAMES H. WOOD *et al.*

CLERKS. *Motion against. Will not lie. When.* Where judgment is had upon a note, the surety will not be entitled to a motion against the Clerk of the Court for failing to pay over to him for his reimbursement moneys received on the judgment from the principal, after the surety has satisfied the same by the payment of the proper amount, to the judgment creditor.

FROM CANNON.

Appeal from the Circuit Court. WM. H. WILLIAMSOM, Judge.

JAMES S. BARTON for J. H. Wood *et al.*

ST. JOHN & FINLEY for Allen.

NICHOLSON, C. J., delivered the opinion of the Court.

This was a motion made by Allen in the Circuit Court of Cannon against Wood, as Clerk of that Court, for $500, alleged to have been paid into his hands as such Clerk, by Isaac Gunter, on a judgment rendered in the Circuit Court in favor of Young against Gunter, Smith & Allen, and Stone for $411.20. In the written notice of the motion, Allen, who was one of the defendants in the judgment, in order to show his right to the judgment and to make the motion, states: "Which judgment I had paid off, as

endorser, to said Young, and have his receipt for the same, and am now entitled to said money."

On the trial of the motion, Allen produced and proved Young's receipt "of James Allen, payment in full of a judgment rendered June 12, 1861, against Isaac Gunter, Mary Smith, James Allen and William Stone."

Allen also produced and proved the receipt by J. A. Wood, Deputy Clerk, from Isaac Gunter, the principal in the judgment, of the amount due on said judgment.

Upon these facts the Circuit Judge held that the payment by Allen to Young of the judgment, was a satisfaction and extinguishment thereof, and consequently that the payment made by Gunter to Wood, the Clerk, could not have been made on the judgment, but that Wood received the money as an individual, and therefore the motion would not lie against him as clerk and his sureties.

The motion for judgment having been dismissed, Allen has appealed to this Court.

The proof in the cause makes out a case of the absolute payment and satisfaction of the judgment of Young against Gunter and others. There is nothing indicating that it was only a purchase of the judgment by Allen, and a transfer thereof to him. But by the payment as proved, the judgment was extinguished and all proceedings thereon afterwards were nullities. It follows that when Gunter afterwards made the payment to Wood, he did not make it on

any subsisting judgment. The Circuit Judge was, therefore, correct in holding that neither the Clerk nor his sureties were responsible on motion for the money so paid to Wood.

The judgment is affirmed.

## H. C. Murphy *v.* Solomon Green *et al.*

1. Guardian and Ward. *Married woman. Settlement of estate. Practice.* A guardian may, by bill in Chancery, defeat the claim of his ward's husband to personal property in his charge as such guardian, and have the same settled upon her to her sole and separate use, as the Court may direct.

Cases cited: Phillips *v.* Hassell, 10 Hum., 199; 2 Story, Eq., § 1414.

### FROM ROBERTSON.

Appeal from the Chancery Court. Charles G. Smith, Chancellor.

Stark & Judd for Murphy.

James L. Watts for Green *et al.*

Nicholson, C. J., delivered the opinion of the Court.

H. C. Murphy *v.* Solomon Green *et al.*

H. C. Murphy was guardian of Nancy Murphy, his sister, and as such had in his hands $996.00, which was her entire patrimony, except $30 or $40, in the hands of Shaw, administrator of their father, G. G. Murphy. Nancy, being thirteen years of age, was married to Solomon Green, a man of no substance, having neither land nor money, nor property of any kind—one who will not labor for a support, and has no income from any source, and is considered wasteful aud prodigal. The marriage took place without the knowledge or consent of complainant, who is the brother and regular guardian of Nancy. Very soon after the marriage, the husband called on complainant, and demanded a settlement, and payment of the amount in his hands as guardian. Complainant refused to pay the money, but proposed to invest it in a home for his sister, and have the title made to her. Her husband refused the offer, and repaired to an attorney and, perhaps, employed him to bring suit.

Complainant immediately filed this bill, making the allegations already cited, stating that he has the money, subject to the orders of the Court—makes Green and wife and Shaw (administrator) parties, and asks the Court to protect the interests of his sister and ward, by settling the amount in his hands and in those of Shaw upon his sister, to her sole and separate use, in such way as the Court may deem best.

Defendant, Green and wife, moved to dismiss the

bill for multifariousness, and for want of equity. The Chancellor sustained the motion and dismissed the bill. From the decree complainant has appealed.

It was formerly matter of no inconsiderable doubt, whether the equity of a wife to a settlement could be enforced, except when the husband or his assignees or creditors came into Court to obtain possession of her estate. But Judge Story says:

"The doctrine is now firmly established, that whenever the wife is entitled to this equity for a settlement out of her equitable interests against her husband, or his assignees, she may assert it in a suit, as plaintiff, by bringing a bill in the name of her next friend. And certainly there is much good sense in disallowing any distinction, founded on the mere consideration who is plaintiff on the record; for her equity is precisely the same, whether she is plaintiff or whether she is defendant. If it is a substantial right, it ought to be enforced in her favor, whenever it is withheld from her." 2 Story Eq., § 1414.

In the case of *Phillips* v. *Hassell*, 10 Hum., 199, Judge McKinney says:

"It is immaterial whether the bill be brought by the husband and wife jointly, to obtain possession of her fortune, or by the wife alone, in the name of her next friend, or by a third person in her behalf. The result of the cases seem to be, that whenever this right of a married woman is brought before the Court, in opposition to the claims of the husband, his creditors or assignees, it will be acted on, who-

ever the person applying to the Court may be. No distinction is allowed, founded upon the mere consideration of who is the party in the record; the equity is precisely the same, in whatever form, or by whomsoever presented."

In that case the husband and wife had filed their bill against the administrator of the guardian of the wife, for an account. It does not appear that the administrator sought to have a settlement made on the wife, but some of her friends came in by petition and asked for the protection of her rights. The wife answered the petition, and indignantly repelled the interposition of her friends. She was examined separate and apart from her husband, and insisted on the fund being paid over to her husband. She was fifteen years of age, and this Court held that she could give no consent, and settled the entire fund, about $1,900, upon her.

In the present case, the brother and guardian invokes the protection of the Court against the claim of the husband. The wife is only thirteen years of age, and was married without the knowledge or consent of her guardian, and to a man who, upon a motion to dismiss, is to be taken to be without any means, unwilling to labor for a support, and wasteful and prodigal. The bill is replete with equity, and the guardian and brother has discharged his duty in appealing to the Court in behalf of his ward and sister.

The decree will be reversed, and the cause be

remanded for answers by all the defendants. The costs of this Court will be paid by Green.

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# ABNER SUMMERS *v.* JOHN F. HOWLAND, ROBERT HOWLAND *et al.* and ALFRED BLACKMAN *v.* JOHN F. HOWLAND *et al.*

1. FRAUD. *Evidence of. Contemporaneous transactions.* In questions of fraud evidenee is admissible of other contemporaneous transactions of a similar fraudulent nature, for the purpose of showing interest, and especially is this the case where all the transactions are connected and apparently in concert.
2. SAME. *Same.* The fact that one conveyance made at the same time as others to different parties is shown to be fraudulent, will not be conclusive as to others, but this fact, together with other circumstances, may furnish the ground for weighty inference tending in the same direction, and should be looked to in arriving at a conclusion in such a case.

Case cited: Abbott's Dig., Vol. 2, p. 767, § 2098–9, 2100.

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FROM RUTHERFORD.

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Appeal from the Chancery Court. JOHN P. STEELE, Chancellor.

E. A. KEEBLE for Summers.

RIDLEY & BURTON and LILLARD for White and Howland.

Abner Summers *et al.* *v.* John F. Howland *et al.*

FREEMAN, J., delivered the opinion of the Court.

The bills in this case were filed against J. F. Howland, Robert Howland, Thomas S. Ford *et al.*, to set aside certain conveyances of land made by White and John F. Howland. The only question before us for decision, however, is the validity of a conveyance of about 200 acres of land conveyed by John F. Howland to Ford, and the conveyance of 100 acres to Robert Howland, the son of John F. Howland. The original bills were filed with the purpose of setting aside five different conveyances, made on the same day by B. G. White and John F. Howland, but the Chancellor decreed all to be valid, or at any rate denied relief except as to the two deeds mentioned, and complainants did not appeal. Defendants, John F. Howland, Thomas Ford and Robert Howland, appealed from the decree against them, declaring the deeds made to them void. The correctness of this decree is the question for our decision.

It is proper to remark that the charges in the bill make a case of fraud as against all the five conveyances attacked; that they were part of a general scheme to cover up the property of the conveyors, and hinder and delay their creditors in the collection of their debts.

The deeds were all executed on the same day, at the same place, written by the same draftsman. The testimony as to all conveyances is found in the

record, and it would be next to impossible, if we were to attempt it, to separate the testimony bearing on one deed, from that bearing on another. We think it proper, in such case, to look at the entire transaction, and in so far as one shall reflect any light upon the motive prompting the other, to get the benefit of such aid in coming at our conclusions.

This principle is thus laid down in several cases in New York: "That upon a question of fraud evidence is admissible of other contemporaneous transactions of a similar fraudulent nature, for the purpose of showing the interest." See Abbott's Dig., Vol. 2, p. 767, § 2098–9, 2100, and cases there cited.

And the principle would be the more applicable where all the transactions were connected, and made apparently in concert. We do not say the fact that one conveyance, made at the same time, as others, to different parties, is or might be shown to be fraudulent, would be conclusive upon the others, but the fact might, in connection with other circumstances, furnish the ground for weighty inferences tending in that direction, and should be looked to in arriving at a conclusion in such a case.

It appears from the pleadings and proof in this record, that B. G. White and John F. Howland had been men of good property and independent circumstances, but at the termination of the war found their property swept away, except their lands, and themselves involved in debt beyond their means to pay. It further appears that John F. Howland was under

apprehenion that the lands of persons sympathizing with the South in the late civil war would probably be confiscated. The debt due to complainant, Summers, was a security debt on the part of Howland, and the principals insolvent, and unable to meet it.

Under these circumstances, on the 5th of August, 1865, Howland and White, by pre-arrangement, met with the other parties to these deeds at the same place, and before they separate all their property is conveyed, and they stripped of the legal title to every thing they possessed. In addition to this it appears that all the parties to these conveyances were more or less related to each other, either by blood or marriage, we believe, except Ford, who was a renter, and notwithstanding his assumed purchase of the 200 acres, continued to rent, rather than occupy his own land.

But, passing from these general considerations, we proceed to refer to some of the circumstances peculiar to the two consequences immediately in question, to-wit: The deed to Ford for the 200 acres of land, and the one to Robert Howland. However, before doing this, a remark of John F. Howland, made to Mr. Lowe a short time after the deeds were made, will serve to point to the motives on his part for the conveyances. Mr. Lowe asked him what was the matter, that he had sold his land, when Howland told him that his liabilities or security debts were such that if he did not do something he would not have land enough to bury him.

This remark, taken in connection with the fact that he had then already disposed of by deeds every acre he owned, is not without its significance, and points to the idea, then no doubt in his mind, that he had in some way, in connection with these conveyances, averted the supposed danger impending.

Take the remark in connection with another fact, that he has ever since actually remained in occupation of his old home, and it would seem very naturally to tend to the conclusion that there was in these swapping conveyances, and underneath them, a secret trust in his favor, by which he would at least secure enough of his considerable landed estate to himself "to bury him in;" in other words, a continued right to the property in some form.

But to return. It appears that Ford was a man with family, owning no land of his own; possessed only of a few horses and other stock. It is clear from the proof that up to this time he was not a married man. It is equally clear that he did not have money to pay on the land at the time of the supposed purchase, as he purchased on a credit of one and two years. Land was depressed in price at the time, and no sales being made in the country. It is scarcely probable, under these circumstances, that such a man would have been selected for a *bona fide* purchaser of land, by one who, as is professed in the answer, was selling his land solely to realize means to pay his debts.

It is attempted to be shown that Ford paid these

notes, though perhaps, not at maturity, yet with reasonable promptness, notwithstanding the pendency of this litigation. This promptness to pay off the notes with his vendor insolvent, and a suit pending by which he was liable to lose the property, is not the reasonable conduct of a poor man, honestly investing all his hard-earned means in real estate. There certainly would have been some hesitancy in making the payments, and probably he would only have done so after consultation with counsel, and under his advice, if at all. Yet no such proof is made. Ford was elected a constable in March, 1866, we believe. Yet it is not probable that he should have made money enough by this office to have paid $2,500 in two years. And there is a total absence of evidence of the means of realizing it from other sources. What crops he made as a farmer, if any, are not shown nor attempted. Even if the office was a source of profit, neither he nor Howland could have anticipated his election to it in August, 1865, so as to have made it a basis of credit.

Another circumstance against the good faith of this conveyance is, that while they recite the money to have been paid, yet at the same time, an obligation seems to have been taken from Ford, recognizing the existence of the lien on the land. The obligation was never registered. Now if the transaction had been fair, and a lien to be retained, why not retain this lien on the face of the deed, and thus make it good against all the world until paid.

We can see how the deed would serve all the better to keep off suspicion, and deter creditors from attacking it, by appearing to have been made for cash paid, but when the fact was otherwise, and a lien to be retained, we can see no reason why it should not have been put in the face of the deed. Nor can we see any reason why it should not have been shown on the face of the deed that the land was sold on a credit, and notes given, when the parties were so careful to retain a lien in a separate instrument. It would thus have made the notes all the better for use in the payment of Howland's debts, the ostensible object for making sale of the land.

As a last fact to which we refer on this question, it is proven that after the sale of the lands Howland went to one Miller, and proposed to let him have some of the notes received for the land. It seems that he claimed that there was an old balance due Miller on a mule transaction, of some fifty or sixty dollars, perhaps, and he told Miller that if he would take the notes he would settle this balance. This was a matter of difference between them that Miller had no note for, and which he says he never expected to exact from Howland, as he had insisted Miller should make reparation to him for a mule purchased and taken South, which had proved defective in some way. It is evident this was a debt which Howland had not hitherto been inclined to recognize; yet, in order to induce Miller to take the notes, he was now willing to settle it, poor as he

was. He did not, it seems, propose to sell the notes to Miller, but to let him have them and take his receipt for them. Miller says he declined to do so, saying to Howland that he was in as many difficulties as he wanted, and would not involve himself in more. The reply indicates unmistakably what the character of the proposition was; that is, that Howland wished Miller to take the notes, give his receipt for them, and hold them for him—thus effectuating his purpose to conceal his effects from reach of creditors, as far as he could.

Without further discussion, or citation of numerous other facts tending to the same conclusion, we conclude we have presented enough to show that the Chancellor's decree was correct, and this deed a fraudulent device, to cover up the land from the reach of creditors.

As to the deed to Robert Howland, we need say but little more than that nearly all of the reasons given as to the Ford deed apply with equal force to this conveyance. In addition, he was the son, who might, without any feeling that he was doing wrong, very naturally conclude it was his duty to aid his father in saving his estate. The son was poor in 1865—had just returned, perhaps, from the war—had no means—is admitted, however, to have been industrious and energetic. Standing alone, it might have been difficult to pronounce the deed to him absolutely fraudulent, but being connected with the other transactions, of which it evidently forms a part, it is cer-

tain the son would be familiar with the purpose of the transactions, and no doubt participated in them, honestly believing it to be his duty, probably; still the law makes no allowance for our generous motives, where the rights of third parties are to be affected by their operation.

We must in this case, too, affirm the decree of the Chancellor. The land will be sold by the Clerk of this Court, unless the money be paid in 60 days. Costs to be paid out of the fund arising from the sale.

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## L. B. Thompson *v.* S. B. and W. M. Lawrence.

1. Tax sale. *Requisites of deed.* It is essential to the validity of a deed from a revenue collector that it should show affirmatively, not only that a sale of the land was in fact made, but that it was at the time and at the place required by the Statute. And where the recitals of the deed show that the sale was had on the day required by law, this will constitute only *prima facie* evidence of the fact.

   Cases cited: Henderson *v.* Starritt, 4 Sneed, 472; Conrad *v.* Darden, 4 Yer., 308.

   Code cited: §§ 620, 612.

   Statutes cited: 1844, ch. 92, § 1; 1835, ch. 15, §§ 8, 4.

2. Same. *Same.* If land be reported for condemnation to the Circuit Court of the same year for which the taxes are due, under these

circumstances the Court will have no jurisdiction to render judgment in such case under the Act of 1835, § 4 and 8; Code, § 612, *et seq.*

FROM DEKALB.

Appeal from the Chancery Court. B. M. TILLMAN, Judge.

JOHN H. SAVAGE for Thompson.

J. B. ROBINSON for Lawrence *et al.*

DEADERICK, J., delivered the opinion of the Court.

The bill in this case was filed in the Chancery Court of DeKalb County, on the 20th of February, 1867. This bill alleges that James Kager was the owner of a certain tract of land in Warren, now DeKalb, County, granted by the State to him in 1838, by grant No. 6314, and describing the land as lying on Link Creek, of about 400 acres; that in 1840 James Kager sold this tract with others, and that W. P. Lawrence, the ancestor of defendants, obtained one of the notes given for the purchase-money, and filed his bill to subject the land to the payment of the purchase-money, in the Chancery Court at McMinnville. That the case was taken to the Supreme Court, and a lien declared and the land sold for its satisfaction, and purchased by said W. P. Lawrence; that said W. P. Lawrence afterwards died, and devised said lands to defendants, and that they had

brought an action of ejectment against complainant in the Circuit Court of DeKalb County, to recover the lands.

It further alleges that plaintiffs in the ejectment suits had never had possession of said lands, and that the same had been sold twelve or thirteen years before for unpaid taxes; that the land was reported by the revenue collector for unpaid taxes due the State and County, in the name of James Kager, and was condemned by the Circuit Court of DeKalb County, and ordered to be sold therefor, and that the same was thereafter duly advertised and sold according to the provisions of the Statute, and was purchased by one Womack, as the agent of said James Kager; and that Kager, who was his father-in-law, afterwards conveyed the land to complainant; that the record of the sale and return of the tax collector has been lost or destroyed, and his defence is thereby embarrassed at law, and asks the aid of a Chancery Court to set up and establish said lost record, and prays for an injunction to prohibit the prosecution of the action of ejectment, until the hearing of the bill; and upon final hearing that the title of complainant be declared valid under the tax sale, and defendants perpetually enjoined from prosecuting their action of ejectment.

Complainant claims that, as agent of Kager, he has claimed and exercised acts of ownership over the land ever since the purchase at the tax sale.

L. B. Thomas *v.* S. R. and W. M. Lawrence.

It appears that the land in controversy was directed to be sold by a decree of this Court at its December term, 1845, and that the same was sold, and W. P. Lawrence became the purchaser, and the sale was confirmed and the title vested in the purchaser at the December term, 1846, and ordering possession to be given to said W. P. Lawrence.

Defendants answered the bill, and set up their title as devisees of their father; deny any knowledge of the sale of the land for taxes, or any possession or occupancy of the land by complainant or James Kager, or other person, in hostility to their right, and require strict proof, etc.

Complainant files an imperfect transcript of proceedings of the DeKalb Circuit Court which shows that Joseph Atnip, Revenue Collector, at the April term, 1854, reported to said Court certain lands to be condemned and sold for taxes due thereon for the year 1853. Then follows the report:

"I, Joseph Atnip, Revenue Collector of the public taxes of DeKalb County, do hereby report to Court the following tracts of land, town lots and parts of town lots, as having been given in for taxes for the year 1853; that the taxes thereon remain due and unpaid, and the respective owners or claimants thereof have no goods or chattels within my county on which I can distrain for said taxes, to-wit:

"James Kager, 400 acres of land, in district No. 7, valued at $200; tax 47 cents.

"JOSEPH ATNIP, R. C.
Of DeKalb County."

"Subscribed and sworn in open Court, April 21, 1854. J. B. TUBB, Clerk."

Then follows the judgment of the Court, directing the lands to be sold as the law directs. As far as the record of the Circuit Court discloses, no further or other proceedings were had. The Clerk certifies that after diligent search no record of the issuance of an order of sale, or report of sale can be found in his office.

As a record, therefore, these proceedings are wholly insufficient to sustain the validity of the tax sale, nor is there any parol or other evidence in the record sufficient to authorize this Court to supply the lost or destroyed record of the proceedings which are alleged to have constituted a part of the record of the proceedings in the tax sale.

It is, however, insisted that the recitals in a deed on file from the revenue collector, the successor to Atnip, to complainant under the Act of 1844, ch. 92, § 1, are *prima facie*, sufficient for the purpose.

As before stated, Kager conveyed his right under this purchase, at the alleged tax sale, to his son-in-law, the complainant. This was done by a quit claim deed, bearing date January 1, 1867. This deed being exhibited to Eli Vick, Revenue Collector of DeKalb County, he executed to Thompson, on the

1st of September, 1868, the deed upon which he now relies to support his title to the land.

If the bill in this case could derive support from the collector's deed, it would be only because the Act of 1844 makes it *prima facie* evidence, under certain circumstances, that the land sold lies in the county in which it has been reported for non-payment of taxes; that it has been duly reported that the sale was ordered and advertised.

The deed was executed in 1868 by a successor of the collector, who reported the land, and more than fifteen years after it was so reported, according to its recitals, and more than a year after complainant filed his bill. When the land was sold does not appear. The deed recites that "Joseph Atnip, Revenue Collector, after advertising the land according to law, on the —— day of ———, 18—, sold said land," etc.

The Act of 1835, ch. 15, Sec. 8 and 4, requires that the sale "shall be made at the Court-house of the county wherein the land shall be situated, on the first Monday of July, and succeeding day or days, if necessary, in each and every year," for the taxes due for the preceding year or years. §§ 4, 8.

This provision is retained in Code, § 620.

It is essential to the validity of a deed from a revenue collector that it should show affirmatively, not only that a sale of the land was in fact made, but that it was made at the time and at the place required by the Statute.

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In the case of *Conrad* v. *Darden*, 4 Yer., 308, where a tax sale was made in July, the Act of 1819, then in force, requiring it to be made first Monday in November, it was held, the sale being unauthorized, that the deed was void.

In this case, the sale is not stated to have been made on any day, month or year. If the recitals in the deed had been that the sale was made on the day required by law, this would have been but *prima facie* evidence of the fact according to the case of *Henderson* v. *Starritt*, 4 Sneed, 472.

But here all the evidence we have of a sale is, the recital in the deed that the land was sold on the —— day of ———, 18—. This, we think, is wholly insufficient.

This deed further recites that Atnip, Collector of public taxes for the County of DeKalb, and State of Tennessee, for the year 1853, returned the following report of lands to be condemned and sold for the taxes due thereon, to the April term of the Circuit Court of DeKalb County, Tennessee, for the year 1853, to-wit:

"James Kager, 400 acres of land in district No. 7, valued at $200; tax 47 cents.

"And whereas, the said Court did, at its April term, 1853, aforesaid, condemn said land to be sold, for the taxes accrued thereon," etc.

The Revenue Collector was not authorized to report lands for condemnation for taxes of 1853, to the April or any other term of the Circuit Court in

1853. The Act of 1835, §§ 4 and 8, authorizes such report only as to the taxes due for preceding years; and the Court had no jurisdiction to render judgments or order sales of land under such circumstances. Code, § 612, *et seq.*

To whatever extent, therefore, the deed is taken as evidence, it applies to taxes of 1853, it is fatally defective in its recitals, and shows that the Circuit Court had no jurisdiction to render a judgment for taxes of 1853.

Relying on the imperfect record of the Circuit Court, we have not even *prima facie* evidence of advertisement or sale.

The decree of the Chancellor must be reversed, and the bill dismissed at complainant's cost.

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## J. A. Collger *et al.* *v.* M. Francis *et al.*

1. Bills and notes. *Insolvent estate. Fraud. Evidence.* The declaration of the assignor of a note against an insolvent estate, as to his fraudulent intentions, are not competent evidence against his assignee, where such declarations are not made in the presence of, nor brought to the knowledge of the assignee.
2. Same. *Same.* If a note be transferred for a sum greatly inadequate to its real value, where the purchaser is trading with a man in embarrassed circumstances for a note that is over due, and with means by which with proper inquiry he could approximate the real value of the note, though there is no evi-

dence of fraud, the suspicious character of such a transaction will limit the holder's recovery to the amount actually paid with interest by him for the same.

Case cited: Alley *v.* Connel, 3 Head, 578.

FROM RUTHERFORD.

Appeal from the Chancery Court. B. M. TILLMAN, Chancellor.

CANTRELL & GRIBBLE for Collger *et al.*

HEAD & SONS and J. S. BARTON for Francis *et al.*

NICHOLSON, C. J., delivered the opinion of the Court.

Complainants being judgment creditors of M. Francis, filed this bill to subject to the satisfaction of their claims the proceeds of a note of $1,650, executed by James S. Odom, deceased, payable to M. Francis, and by him assigned, in 1860, to R. D. Puckett, upon the ground that the assignment was fraudulent and void, as against the creditors of M. Francis.

The assignment was made after the death of Odom, and while his estate was being administered as insolvent in the Chancery Court. The bill alleges that the assignment was without consideration, and calls upon Francis and Puckett to discover on oath in answer to specific interrogatories, whether the assign-

ment was not fraudulent; what was the consideration thereof; how the same was paid, etc.

Francis, being dead, does not answer, but Puckett answers in detail, denying the fraud, stating that he bought the note in good faith, paid $355 for it, and that, as it was an insolvent estate, this was a fair consideration therefor. All the special interrogatories are fully answered.

It appears that the *pro rata* share of the estate of Odom, subject to be applied to the note in controversy, is about $950, which is in the hands of the Clerk and Master, and the question is, whether Puckett, the assignee, or the complainants, creditors of Francis, are entitled to the money.

The proof is sufficient to fix upon Francis a fraudulent purpose in the transfer of the note, in the absence of any evidence to explain his declarations as to his purpose to make a fraudulent assignment prior to the transfer. Being dead, Francis has not answered. But these declarations of Francis were not made in the presence of Puckett, nor is it shown that he bought the note with any knowledge of such declarations. As they were not made in reference to the title of the note, they are not competent evidence against Puckett. His answer, in response to the special interrogatories, stands as proof for him, and it devolves on complainants to overcome it by other evidence.

The most that can be said of the evidence to overcome the answer is, that it casts some degree of

suspicion as to the *bona fides* of the purçhase by Puckett. That he paid $355 for the note is distinctly stated, and this statement is uncontradicted. It is true, it was an insolvent estate, and there was uncertainty as to how much would be realized; still Puckett was trading with a man in embarrassed circumstances, for a note that was overdue, and with the means, by proper inquiry to approximate the real value of the note.

Under such circumstances, while we can not say that he acted fraudulently in buying the note at $355. the suspicious character of the transaction renders it inequitable that he should hold more of the proceeds of the note than the $355 paid, with interest. 3 Head, 578.

We so hold and decree accordingly, modifying the decree below as indicated. The costs of this Court and of the Court below will be paid out of the fund.

J. M. Thurman *v.* W. R. and J. F. Jenkins, Ex'rs, *et al.*

## James M. Thurman *v.* W. R. and J. F. Jenkins, Executors, and E. N. Dickson.

1. Mortgage. *Of crop. Merely an executory agreement. When.* A writing, supposed to be a mortgage, was executed to secure the payment of money loaned, to be applied in raising a cotton crop, the mortgagor binds himself "to deliver at maturity of the crop so much of the same as will be necessary for the payment of the sum specified in the writing to the mortgagee; conceding that a valid mortgage of a growing crop may be made, the Court held this writing to be merely an executory agreement to deliver cotton enough to pay the debt, but no particular cotton, and remedy upon this instrument would be damages for the mortgagor's failure to deliver the same.

   Case cited: Sugg *v.* Tillman, 2 Swan, 208.

2. Same. *Same.* Though it be so expressed upon the face of a written instrument, it is not a mortgage where it conveys no specific property, and the mortgagee under such circumstances has no right, either legal or equitable, to the property described, such as may be enforced against an attaching creditor.

3. Same. *Same. Fraudulent conveyance.* Where the morgagee procures the writing to be done, he is chargeable with knowledge of its contents, and if it recites a false consideration, it is evidence of fraud, and the deed will not stand as security for the real debt.

   Cases cited: Peacock *v.* Tompkins, Meig's Rep'ts, 317; Hendricks *v.* Pardue, 3 Sneed, 191; Thompson *v.* Walker, Nashville, 1873.

4. Same. *Same. Same.* Where future advances are to be secured, this should appear upon the face of the deed or mortgage.

   Case cited: McGavock *v.* Gordon, 1 Cold., 265.

5. Practice in Supreme Court. *Remanding cause.* On failure to make proper party, the Supreme Court will in proper cases in aid of substantial right, remand to the Chancery Court to make proper parties.

   Case cited: Saylors *v.* Saylors, 3 Heis., 533.

FROM RUTHERFORD.

Appeal from the Chancery Court. Jno. P. Steele, Chancellor.

J. M. Thurman *v.* W. R. and J. F. Jenkins, Ex'rs, *et al.*

RIDLEY & BURTON and E. COOPER for Thurman.

E. A. KEEBLE and EWING & HANCOCK for Jenkins *et al.*

McFARLAND, J., delivered the opinion of the Court.

Thurman filed this bill against Hiram Jenkins and E. N. Dickson. The object was to obtain an injunction to prevent Jenkins from having an attachment or attachments levied on certain cotton, partly unpicked and partly in bales, grown during the year by the defendant, Dickson. Thurman claims the cotton, under a written article, which, on his behalf, it is maintained, is a mortgage. Jenkins was seeking to have the cotton attached under a proceeding instituted for that purpose. Jenkins answered, and resisted the prayer of the bill upon two grounds: First, that the complainant has no valid mortgage; and second, that if the paper be held a mortgage, that it is fraudulent and void.

Before examining these questions, we will first dispose of an objection made by the complainant's counsel, to the right of Jenkins to make any question against complainant's claim.

It is argued that Jenkins has no right in any event to attach the property in the mode he has attempted. It is stated in the bill, and admitted in the answer, that the grounds upon which Jenkins was prosecuting his attachment against Dickson's property was, that Jenkins was the surety of Dickson.

It is argued that, as he has not paid the debt, he has no right to a decree in his favor against Dickson; that he could not prosecute an attachment proceeding against Dickson, except by a bill, making the creditor to which Jenkins stood bound as surety, a party, which it is averred he has not done.

The validity of the attachment proceedings, under which Jenkins was attempting to have the cotton attached, can not be determined in this case. That case is not before us. If any question exists as to the validity of the proceeding, to determine it, we would at least have to have the record of the case before us. It is apparent that no question of that sort was intended to be raised by the pleadings in this case. The attachment is given to a surety by the Statute upon certain grounds. Code, §§ 3455, 3457.

Whether Jenkins was entitled to the writ or not, and whether he took the proper steps to attain it or not, we can not determine, further than to say this record shows that he was the surety of Dickson, and this case seems to have proceeded upon the idea that he had the right to proceed by attachment against Dickson's property, but that as to the particular property, the complainant has a superior right. And besides, we can not say that the objection made, that the creditor was not made a party by Jenkins, is in fact true. The record is before us. The creditor was the executor of Puckett, who had obtained judgment or decree against Dickson and Jenkins for the

debt. The witnesses, in speaking of the attachments which Jenkins caused to be issued, speak of it as a cause in which the executors or Puckett were parties. If, however, they were not parties, and this he admitted to be a valid objection, if made in that case, it might be remedied. See *Saylors* v. *Saylors*, 3 Heis., 533.

We proceed then upon the assumption that the complainant's right to relief must rest upon his showing a claim superior to Jenkins, assuming the latter to stand in the attitude of a surety, prosecuting an attachment under Section 3457 of the Code. The paper under which the complainant claims is as follows:

"Whereas, James M. Thurman has advanced to me two thousand dollars, to be expended in making and maturing for market my crop of cotton, of about ninety acres, now growing on my place, I hereby obligate and bind myself to deliver to said Thurman, or his order, so much of said cotton, when made, as will be sufficient to fully re-imburse him all the money so advanced to me. But this deed or mortgage is made subject, of course, to the rent lien for rent of the owners of said ground. And I further authorize said Thurman to sell, in his discretion, so much of my said cotton crop as may be sufficient to re-imburse him, as soon after market opens as he sees proper, without further notice to me." Dated 7th June, 1866.

This paper was duly registered. The crop of cotton had been planted, and was then growing. It

is conceded that a valid mortgage of a growing crop may be made. The objection to this is, that it does not create any right in the supposed mortgagee, either legal or equitable, to any specific cotton or quantity of cotton. The writing assumes the possibility at least, that the crop will be more thau sufficient to pay Thurman. Dickson, therefore, did not agree to deliver to Thurman the whole crop, unconditionally, but only "to deliver to him, or his order, so much of said cotton, when made, as will be sufficient," etc.

Suppose the crop was more than sufficient to pay Thurman, could he select any particular part of the cotton, and have his rights specifically enforced against an attaching creditor? We think not. We do not understand from the record, certainly, whether in fact the cotton raised was more than sufficient to pay Thurman or not. Nor do we think this would control the question. Whether it be a mortgage or not, must be determined from its face. We could not hold it to be a mortgage in one event, and not a mortgage in the other event.

That the paper is styled a mortgage or deed on its face, does not make it so. The parties may have intended to make a mortgage, but they have not used the words necessary to create the right in the supposed mortgagee to any specific property.

We should construe this to be not a mortgage or conveyance, but an executory agreement to deliver to the complainant, on his order, cotton enough

to pay his debt, but no particular cotton. True, it says so much of the cotton raised on Dickson's place, etc., but he does not agree to deliver all, or any particular or aliquot part. His remedy upon this would be damages for Dickson's failure. And we do not say that if this objection was out of the way that the paper would constitute a mortgage.

This case was before the special commission last summer, and that tribunal came to the same conclusion. See opinion, citing *Sugg* v. *Tillman*, 2 Swan. 208. This is fatal to the complainant's case.

The paper recites upon its face that Thurman had advanced to Dickson $2,000. It is admitted that this was untrue; that in fact, that he had at the time advanced but little more than $1,000; that he afterwards advanced other sums, making in all something more than $1,400. Since the case of *Peacock* v. *Tompkins*, Meig's Rep'ts, 317, it has been held that the recital of a false consideration is evidence of fraud. In the case of *Hendricks* v. *Pardue*, 3 Sneed, 191, in applying this rule, it was held that as that was no evidence of fraud, in fact, the deed might stand as security for the real debt. In *Thompson* v. *Walker*, at the present term, it was held that the creditor not being in any way connected with the execution of the deed, was not charged with the fraud, by reason of the recital, and that the deed might stand as a security

for his real debt, but in the present case the bill shows that the complainant himself procured the execution of the writing, and is, therefore, charged with a knowledge of its recitals, and these recitals being admitted to be false, it would seem to follow that he is charged with the consequence.

The explanation offered in proof does not meet this objection. It is insisted that the agreement was that he should advance $2,000, but this was never done. Where future advancements are to be secured, this should appear upon the face of the deed or mortgage. See *McGavock* v. *Gordon*, 1 Cold., 265.

The ground of fraud is probably, therefore, equally fatal. Decree for defendant.

# R. H. Walker *v.* J. Edward Stacey *et al.*

Bankruptcy. *Bankrupt can not recover property. When.* A bankrupt can not, after he has been adjudged such, prosecute a suit to recover property which should have gone to his assignee, when his right to recover is predicated upon a title in existence before the adjudication in bankruptcy, although the property sought to be recovered had been omitted from his schedule and was not embraced in the assignment, and this without regard to whether the defendant had any valid claim to the property or not.

FROM DAVIDSON.

Appeal from the Chancery Court. Edward H. East, Chancellor.

John S. Brien and Burch for Walker.

Wilkin & Chamberlain, W. G. and M. M. Brien for Stacey *et al.*

McFarland, J., delivered the opinion of the Court.

Walker filed his bill to foreclose a mortgage given by Stacey upon a leasehold property in Nashville, called the Stacey House, to secure a debt. Stacey and Brien, the trustees, answered and admit in substance the allegations of the bill, and there was a decree of sale for complainant. On the next day Bertram, who had no interest in the litigation be-

tween Walker and Stacey, filed a petition in which he states that he had purchased the property at a sale in other cases, under other mortgages and conveyances by Stacey, which he insists were superior liens. Upon this the decree of sale in favor of Walker was set aside and Bertram made a defendant. He first demurred to the bill, and then answered and filed a cross-bill attacking vigorously Walker's mortgage, upon the ground that it had expired by its own terms, had been paid up or settled and abandoned, etc. Walker and Stacey are both made defendants.

Stacey, in his answer, takes sides with Bertram, although his former answer had virtually admitted Walker's claim. He also in this answer pleads his discharge in bankruptcy, which he files. Upon the hearing, the Chancellor decreed in favor of Walker, holding that his mortgage was a valid lien for his debt, and superior to any lien or claim shown by Bertram. The cross bill of Bertram was dismissed and a decree ordering a sale of the property unless the money was paid in a given time. It was held, however, that Stacey's discharge in bankruptcy was valid, and no decree was rendered against him, the decree being simply to enforce the lien against the property. From this decree Bertram prayed an appeal, but has not prosecuted it, failing to give bond, but Stacey has prosecuted an appeal, and the motion is to dismiss this appeal. We do not see that he has any further interest in the case, his discharge in bankruptcy, as the Court held, discharged him from

the debt, and there was no decree against him. He has no further interest in the property. What interest he had passed by operation of law to his assignee for the benefit of his creditors, as it is not shown to come under any exemption. We held at the last term at Jackson that a bankrupt could not, after he was adjudged a bankrupt, prosecute a suit to recover property which under the bankrupt law would go to the assignee, when his right to recover was predicated upon a title in existence before the adjudication in bankruptcy, although the property sought to be recovered had been omitted from his schedule and was not embraced in the assignment, and this without regard to whether the defendant had any valid claim to the property or not. We do not see that Stacey has any further interest in this controversy. He is discharged from the debt, and the property in question is gone from him; no matter how it results, he can never claim any interest in it.

Stacey's appeal will be dismissed.

# DAVID ADCOCK and WIFE *v.* PATTON & DURHAM *et al.*, and PATTON & DURHAM *v.* DAVID ADCOCK and WIFE *et al.*

1. UNREGISTERED TITLE BOND IS NO OBSTACLE TO A SALE OF LAND BY EXECUTOR AGAINST VENDOR. A bond for title given upon the sale of land does not pass the legal title to the vendee, and, if unregistered, imposes no impediment to the rights of a judgment creditor of the vendor.

2. SURETIES TO A JUDGMENT. The sureties against whom, and the principal, a bank has recovered judgment, may, by agreement with the bank, deposit their note with the bank's attorney, bid off the land at the sale made under execution issued on the judgment, and then have the note discounted to settle their bid.

FROM DEKALB.

Appeal from the Chancery Court. B. M. TILLMAN, Chancellor.

JOHN H. SAVAGE for Adcock.

R. CANTRELL for Patton and & Durham.

DEADERICK, J., delivered the opinion of the Court.

D. Adcock and wife file their bill to assert and establish title to certain lands in DeKalb County, for which title bond was executed by Wm. Adcock to

Jacob Adcock, and which title bond was assigned by Jacob to Sarah Adcock, wife of David. This bill was filed in the Chancery Court at Smithville in December, 1860.

The cross bill, after answer, was filed, claiming that complainants (Patton & Durham) had purchased the lands in August, 1860, at execution sale upon a judgment rendered in DeKalb Circuit Court, in favor of the Bank of Tennessee, against Jacob Adcock, drawer, and Wm. Adcock, first endorser, the land having been sold as the property of William and Jacob Adcock. Two questions are presented in the Record:

1. It is insisted by complainants in the original bill that the bond for title from William to Jacob, dated November 18, 1853, and assigned by Jacob to Sarah Adcock December 27, 1853, vested her with the title, and that Patton & Durham therefore acquired no title to the land by virtue of their purchase under the execution sale.

The bond stipulates that William was to retain as much of the land and timber as he chose during his life. S. Adcock (a brother of David) and Patton state that David lived on the land from the time of his purchase up to the year 1860, when it was sold. Durham testified that William continued in possession from the time of the alleged sale until 1863 or 1864, and that it is in proof that David was generally insolvent from the time he was fully grown. Adcock also proves the execution of the bill of sale, and

that Sarah paid Jacob $75 to $100, and was to pay the balance as he needed it. The title bond, however, was never registered. And Elijah Allen testifies that he heard the contract between David and Jacob in 1858, and saw a bond, and David and Jacob were both embarrassed and insolvent. This transfer of the title bond by Jacob to David is dated December 27, 1858, but three days before the date of the bill of exchange upon which Jacob was subsequently sued in the Circuit Court of DeKalb County, but whether the transfer was intended to hinder or delay creditors, it did not vest Sarah Adcock with any legal title to the land. This remained in William Adcock, subject to execution for his debts, and interposed no impediments to the rights of his judgment creditors.

But it is further insisted that the debt to the bank was paid and satisfied before the levy of the execution upon the land, and therefore such sale and levy were void.

T. B. Murray, who was the attorney for the bank, states that he obtained the judgment against Jacob and William Adcock and Patton & Durham, the complainants in the cross bill, and thinks the judgment was paid by the renewal of the note in bank by Patton & Durham, and some money paid by them; and that he gave permission to them or to some one for their benefit to run the execution upon the judgment. He adds that his recollection of the transaction is not distinct. Hallum, the sheriff,

states that he levied the execution upon the land and sold it, and that he does not recollect of their running an execution against the land that had been satisfied.

The Record of the proceedings in the Circuit Court shows that on the 18th of June, 1860, an execution was returned by Hallum, showing that he had levied the same upon a negro and other personal property of Durham & Patton, and at the instance of plaintiffs in the execution, had released the levy and returned the execution unsatisfied. It is also shown by said Record that on the 28th of June, 1860, ten days after the return of the original execution in the case, an alias execution was issued and was levied by said sheriff upon some personal property, and upon the land in controversy. The personal property was sold July 17, 1860, for $91.50, and the land on the 6th of August, 1860, and the balance was settled with the bank's attorney August, 1860, including the price of the personal property.

It further appears from the Record in this cause that Patton & Durham executed their note to the bank on the 18th of June, 1860 (the day of the return of the original execution unsatisfied), payable at Sparta, four months after date, for $1,100. Patton & Durham prove that they made the arrangement with Murray, the bank attorney, to have the execution issued and levied upon the land, for the purpose of subjecting it to sale for the bank debt, so that the property of William and Jacob Adcock

should pay the debt for which they were primarily liable, and they gave their note to the bank for the amount of the debt as collateral security, and not in extinguishment of the debt. This they prove was the agreement as understood at the time, and that they were to buy the land, and then the bank was to discount the note. This arrangement was afterwards carried out, and the note discounted, and R. Cantrell, agent of the bank gave them a receipt against the execution. R. Cantrell corroborates the statements of Patton & Durham. He says he was employed by them as attorney, and they and he made the arrangement with Murray, the bank's attorney, for Patton & Durham to bid the bank debt upon the land, and that the note was then to be discounted by the bank. Cantrell says that he was then acting as the attorney of Patton & Durham, and knew at the time that if they paid off the bank debt before sale they would have no right to sell upon a satisfied judgment; that Patton & Durham were directed by him to deposit their note with the bank's attorney, bid off the land, and then have the note discounted to settle their bid. And this arrangement was expressly made to avoid the satisfaction of the judgment before the sale, and it was so understood by Patton & Durham and Murray as he (Cantrell) understood at the time.

We are satisfied that such was the arrangement and understanding of the parties to it, at the time, as no other or different one would have effectuated

the objects manifestly intended to be attained. The execution was returned unsatisfied to the June term of the Court, and on the day of its return the note bears date, which was deposited with Murray. It was incompetent for Patton & Durham to make this arrangement for their own protection.

The result is, that the Chancellor's decree granting relief as prayed for in the original bill, and dismissing the cross bill, is reversed. The original bill will be dismissed and relief will be granted the complainants in cross bill as prayed for. The costs will be paid by defendants to cross bill, subject to rights of Sarah Adcock, as owner of the interest of Patton in the land which has been transferred to her.

G. W. Puckett *v.* Sylvanus Stokes.

## G. W. Puckett *v.* Sylvanus Stokes.

Partnership. *Liability of firm upon note signed by one of its members.* Where only one member of a firm signs his individual name to a note, the firm will be bound thereby if they, as partners, made the contract, and the credit was given to them as such.

FROM DEKALB.

Appeal from the Chancery Court. B. M. Tillman, Chancellor.

Clarke, Crowley & Smallman for Puckett.

J. J. Ford for Stokes.

Deaderick, J., delivered the opinion of the Court.

Puckett filed his bill in the Chancery Court of DeKalb County, to hold defendant liable on two notes, one for $25, and the other for $275, executed by W. Stokes, his partner; the first note for money loaned, and the second for two horses sold them. The notes are exhibited with the bill, and are signed by W. Stokes only. The bill alleges that they both represented to him that they were partners, before and after the loan and sale aforesaid, and that he loaned the money and sold the horses upon the faith of this representation and upon the credit of both.

The answer admits the partnership, but relies on the defence that the notes were executed by W. Stokes individually, and the credit was given to him alone.

The testimony of Puckett and others shows that defendant repeatedly acknowledged his liability on the note for the horses, and promised to pay for them. Stokes admits that he made such promises but insists that they were made under the impression that his brother, W. Stokes, had signed his name to the note, which he was authorized to do.

When the individual note of partners is taken for a purchase or debt of the firm, the presumption is that the vendor or creditor elected to look to such individual for his pay. But if the sale is made to the firm and on the credit of the firm, then it will be treated as a firm debt. There was no particular style or firm name under which the Stokes brothers traded. They could bind themselves if the credit was really given to and accepted by them.

One at least of the two horses was taken off in the drove by the brothers. And while it does not necessarily follow that the partnership is liable, if it got the benefit of the purchase; yet, if they, as partners, made the contract, and the credit was given to them as partners, they are both liable. Such, we think, are the facts in the case as to the $275 note. The Chancellor so held, and we affirm his decree.

# NASHVILLE & CHATTANOOGA RAILROAD COMPANY *v.* WADE.

PLEADING AND PRACTICE. *Plea in abatement for misnomer.* A plea in abatement to a misnomer in the original writ, after correction of the name by leave of the Court and filing of plea in bar by defendant, will not be allowed.

Cases cited: Heis. Dig., 6–7.

## FROM RUTHERFORD.

Appeal from the Circuit Court. W. H. WILLIAMSON, Judge.

PALMER & RICHARDSON and DARRAGH for the Company.

J. W. BURTON, for Wade.

NICHOLSON, C. J., delivered the opinion of the Court.

The writ in this case was issued and served on the defendants by a wrong name. Before filing declaration plaintiff obtained leave to amend the writ by inserting the true name. Declaration was then filed and defendant put in the plea of not guilty. Two terms afterwards defendant obtained leave to file a plea in abatement; but, on motion of the plaintiff, at the same time, the Court struck out the plea, and the cause was tried on the plea in bar.

There was no ground for a plea in abatement for misnomer, after the amendment was made, and especially after plea in bar and two terms after the amendment and filing of the declaration. Heisk. Dig., 6–7.

The Court erred in allowing the plea in abatement to be filed, but corrected the error by striking out the plea and trying the cause on the plea in bar.

This being the only error assigned and relied on, the judgment is affirmed.

J. S. Odam *et al. v.* R. L. Owens, Adm'r, *et al.*

## JOHN S. ODOM *et al. v.* RICHARD L. OWEN, Administrator of JAMES S. ODOM, Deceased, and PETER C. TALLY *et al.*; and PETER C. TALLY *v.* FISHER & JETTON.

1. CHANCERY COURT. *Pleading and Practice. Cross-bill. New parties in. Not allowed. When.* A guardian gave bond and security as such, and afterwards, having received other funds, gave additional bond and security. A bill was filed by the heirs for an account of the money against the guardian and sureties on the first bond, to which answer was made somewhat in the nature of a cross-bill, by the sureties on the first bond seeking to bring the sureties on the second bond before the Court, insisting that they are first liable, as the deficiency grew out of the funds secured by their bond.

   *Held*, that the original bill is not filed against the sureties on the second bond. They have never been made parties in any way; there was no issue in the pleadings as between the complainants in that bill and the appellants; no decree sought against them in any way; and therefore they were not liable to any decree on the original bill, nor could the complainants in this way be rightfully compelled by the defendant in the original bill to take such a decree, or be delayed in the prosecution of their rights by the interposition of these third parties into the litigation at the suit of said defendants.

2. SAME. *Same. Pleading and Practice.* "Such a cross-bill need not necessarily be a bill for discovery, specifically, under the section of the Code, but may well be based on any proper matters of equity growing out of the original bill, or connected with it, on which the respondent might be entitled to affirmative relief on a cross-bill, if filed separately. But we think, under the liberal rules of practice known to our State, and carrying out their spirit, the defendants having failed to demur, or otherwise object to the matter alleged for cross-relief, and having answered and gone to a hearing on the same, we can well treat this as an original bill, in the nature somewhat of a cross-bill, perhaps, and settle the rights of the par-

ties as presented by the issues formed between them on these pleadings."

3. GUARDIAN'S BONDS. *Sureties on. Liable to pro rata contribution.* Where a guardian has given bond as such, and is afterwards required to give an additional bond, (having received other funds).

*Held*, the sureties upon the first and second bond are liable to *pro rata* contribution.

Cases cited: Code, Section 4323; Dering *v.* East, of Winchelsea; Craythorne *v.* Swinburne, 14 Ves., in Fell on Quantity, 307.

FROM CANNON.

Appeal from the Chancery Court. B. M. TILLMAN, Chancellor.

RIDLEY & AVENT for ODOM *et al.*

READY & WOOD and BURTON for Owen *et al.*

FREEMAN, J., delivered the opinion of the Court.

The original bill in this case was filed by the minor heirs of A. G. Odom, deceased, by their next friend, against the defendants, Richard L. Owen, administrator of James S. Odom, and against him and defendant Tally, as sureties of James Odom, on a bond as guardian of complainants, given in February, 1860, and against P. C. Tally, as guardian, who, in February, 1861, perhaps, was appointed their guardian, after the death of said James S. Odom. The object of the bill was to have an account of the moneys belonging to said minors from the said guardian and sureties.

P. C. Tally, in his answer, sets up the following

state of facts, by way of defence to his liability as surety on the bond of James S. Odom:

That A. G. Odom left a will, in which, among other things, he provided that a certain negro woman, named Louisa, should remain with his father, who was appointed his executor, and wait on his children, but if she would not do so peaceably, but became refractory, so that she could not be controlled without punishment, then she was to be sold, and the money retained in the hands of his executor, or loaned out, and interest applied to the support of his children. That the contingency having happened as assumed, on which she was to be sold, a petition had been filed in Chancery, the negro sold, was bought by said Odom, the executor, who had also been appointed guardian, as we have seen, for the sum of over $1,100. That before the Court would permit this money to be paid over to the guardian, it had required he should give an additional bond for the safety of the fund, and that A. H. Fisher and T. J. Jetton were the sureties of Odom on this bond.

Tally insists in his bill that the sureties on this bond, if any body, are liable to complainants for the price of the woman Louisa, on the ground that they interposed themselves between the former sureties, and the money was paid on the faith of this bond, and the sureties of the same. He makes this answer, what he calls a cross-bill, and makes the sureties alone parties to it. They come in and answer the same, without objection, and the case was thus heard,

the Chancellor decreeing that these two last named sureties were primarily liable to complainants in the original bill, for the price of the negro woman, and Tally only secondarily liable for the same. From this decree defendants to the cross-bill, Fisher & Jetton, appealed to this Court.

Before we proceed to a discussion of the question mainly debated before us, as to the order of the liability of the two sets of sureties, it is obvious that this decree is erroneous in this, that the original bill is not filed against Fisher & Jetton. They have never been made parties to it in any way; there was no issue in the pleadings as between the complainants in that bill and the appellants; no decree sought against them in any way; and therefore they were not liable to any decree on the original bill, nor could the complainant in this way be rightfully compelled by the defendant in the original bill to take such a decree, or be delayed in the prosecution of their rights by the interposition of these third parties into the litigation at the suit of said defendants. This must be so, unless we hold that a decree may be had against a party who is not defendant, and not charged by any facts stated in the bill; in a word, without any pleadings affecting said parties in any way.

But the question is presented on the facts of what is called the cross-bill, and proof as to the liabilities arising as between the parties to it, to-wit, P. C. Tally and Fisher & Jetton, the sureties on the bond

taken in the Chancery Court. It is argued, however, that this is not a cross-bill, as authorized by the Code, Section 4323, providing that "the defendant may, by proper allegations, file his answer as a cross-bill, and require a discovery from the complainant, in which case demurrers or pleas may be filed, or other proceedings had upon the answers as upon a cross-bill. This seems to be correct, the Statute contemplating that as the matter of the cross-bill should be in the answer to the original bill, its allegations as a cross-bill should be against the parties to the original bill, to which it is an answer.

We need but remark, however, that such a cross-bill need not necessarily be a bill for discovery, specifically, under this section of the Code, but may well be based on any proper matters of equity growing out of the original bill, or connected with it, on which the respondent might be entitled to affirmative relief on a cross-bill, if filed separately.

But we think, under the rules of practice known to our State, and carrying out their spirit, the defendants having failed to demur, or otherwise object to the matter alleged for cross-relief, and having answered and gone to a hearing on the same, we can well treat this as an original bill, in the nature somewhat of a cross-bill, perhaps, and settle the rights of the parties as presented by the issues formed between them on these pleadings.

The facts on which the rights of the parties on this branch of the case depends, that is, as between

the sureties on the original guardian bond, and the bond taken in the Chancery Court, are substantially as follows:

James S. Odom being the guardian, and Tally one of his sureties, when the sale was confirmed, the Court made the following order:

"That it appeared to the Court that the children were minors, and the bond given in the County Court sufficient, it was ordered that the Clerk and Master pay over the fund to the guardian; but the decree adds: It is further decreed by the Court for more and greater certainty that said guardian, James S. Odom, give an additional bond, with sufficient security, to the Clerk and Master, payable to the State of Tennessee, for double the amount received for the negro, for the use of said minors, and that the Clerk and Master then pay over to said guardian as above directed."

It is now insisted for Tally that the sureties on the last bond are primarily liable for said fund, and he not liable until they are exhausted. As we have said, Tally has not, by his cross-bill, impleaded the complainants in the original bill, so as to have a decree to enforce this equity in his favor against them, (if it be held to exist), and can not ask a decree so far as they are concerned, that they be compelled to take their decree against the second set of sureties, whom they have not sued, in preference to him. They clearly had the right to sue him and recover on his bond, and then the question might

well arise as to the contribution between the sureties on the first and second bonds.

As to the question made in the cross-bill, that the second sureties are primarily liable, and Tally only secondarily so, we hold that this transaction is the same in principle and in fact as the leading case of *Dering* v. *East*, of Winchelsea, where Thos. Dering was appointed collector of duties, and gave a bond, in the sum of £4,000, for the performance of his duties as such collector. Afterwards two other bonds for the same purpose were given, with different sureties. A bill was filed by the surety on the first bond, after judgment against him by the Crown, for contribution on the part of the sureties on the second and third bonds, and the Court decreed that they were liable to such contribution, directing that they should each pay their proportionate share, and the Attorney General should, on such payment being made, enter satisfaction of the judgment had at law, from which we infer that the Crown was by her officer, the Attorney General, party to the bill.

The case before us does not fall within the principle of *Craythorne* v. *Swinburne*, 14 Ves., cited in Fell on Guaranty, 307, where the second bond was conditional, to be void if the parties to the first bond, principal and surety, paid the money; in other words, the last was simply surety for the first. In such case the sureties on the first bond could not have contribution.

In this case the two bonds are simply given for

the performance of the same duty by the guardian, both cover the same fund, and are to the same party. Neither set of sureties can claim that one is liable before the other. On the face of the undertaking, in view of the facts, they are liable to contribute equally for the money received by Odom for the negro, nothing else being in the way.

We can, however, make no final decree in the case in favor of the complainants in the original bill, against the second class of securities, Fisher & Jetton, because as we have said, they are not parties to complainants' bill. We only decide the nature of the liabilities incurred by the parties to the cross-bill, the question made by them in their pleadings, and that the sureties on the second bond are not primarily liable in exoneration of Tally, as held by the Chancellor. As to any equities that may exist as between Tally and the sureties on the last bond, which may be interposed to defeat his right of contribution, when he shall have discharged his liability to complainant, or a judgment be rendered against him for the amount, we leave the parties free to litigate these matters, by dismissing the "so-called" cross-bill, without prejudice.

As complainants in the original bill are before us by appeal, we direct a decree against Tally, as surety of Odom, on the guardian bond of Odom, for the money arising from sale of the negro, and that he pay the costs of this Court. The case can, if desired, be remanded to the Chancery Court for an ac-

count of the amount for which he is liable, and such other proceedings as may be necessary in the cause.

## Solomon Spicer *v.* J. A. Jarrett.

Bills and notes. *Usury. May be recovered. By whom.* Where a party has paid usurious interest, his right to recover the same may be assigned, if the transfer be an absolute and unconditional sale of all interest in the judgment that might be recovered.

Cases cited: Morrison *v.* Deaderick, 10 Hum., 344; 2 Story's Eq. Jur., § 1040, 8, 50; Prosser *v.* Edmonds, 1 Young & Coll., 481.

Code cited: § 1955.

FROM CANNON.

Appeal from the Chancery Court. B. M. Tillman, Chancellor.

Cantrell & Sanders for Spicer.

Jno. W. Burton for Jarrett.

Nicholson, C. J., delivered the opinion of the Court.

Spicer filed his bill in the Chancery Court at Woodbury, against the executors of D. M. Jarrett, to

recover several hundred dollars of usury, paid by him to D. M. Jarrett, in his life-time. After proof had been taken, showing that the executors were liable for usury as charged, Spicer, being about to remove from the county, for value received, transferred to W. H. and S. B. McFerrin a judgment, that he might recover in said suit. This transfer was evidenced by a written assignment and by an order on Spicer's solicitors for the amount they might collect in the suit.

These facts being brought out on petition, the Chancellor dismissed complainant's bill, holding that "the purchase by W. H. and S. B. McFerrin of complainant of his right to prosecute this suit is illegal, as savoring of maintenance."

The case of *Morrison* v. *Deaderick*, 10 Hum., 344, is relied on to sustain the decree of the Chancellor. In that case Geo. M. Deaderick had filed his bill against Morrison to recover money fraudulently and oppressively extorted from him by Morrison, under the pretext of a sale of goods. The Court held that Geo. M. Deaderick's right to prosecute the suit was not such a right as could be assigned. Fielding Deaderick claimed to be the assignee of the right to prosecute the suit after the death of Geo. M. Deaderick.

The Court based their decision upon Section 1040, of 2 Sto. Eq. Jur., where it is laid down that an assignment of a bare right to file a bill in equity for a fraud committed upon the assignor, will be

held void, as contrary to public policy, and as savoring of the character of maintenance. The Court also quoted and relied on the case of *Prosser* v. *Edmonds*, 1 Young & Coll., 481, in which Lord Abinger says, that where an equitable interest is assigned, in order to give the assignee a *locus standi* in a Court of Equity, the party assigning such right must have some substantial possession, some capability of personal enjoyment, and not a mere right to overset a legal instrument or to maintain a suit."

Upon these authorities the Court held that the assignment from George M. to Fielding Deaderick was void.

It is obvious that the Court proceeded in that case upon the ground that Geo. M. Deaderick had nothing more than a mere naked right to maintain a suit to recover the money fraudulently extorted from him; this was a personal right which died with him, and could be enforced by none but himself.

But by our statute usurious interest paid may be recovered at the suit of the party from whom it was taken, or his representatives, or it may be subjected by any judgment creditor of such party to the satisfaction of his debt. Code, § 1955.

When usurious interest is paid or received, the party receiving it holds it for the use and benefit of the party paying it. The law recognizes it as an indebtedness which passes to the representatives of the paying party and which he may enforce, as well as the party himself, and which his judgment creditor

can reach. It follows that such a claim may be assigned without violating the rule laid down in the case of *Morrison* v. *Deaderick.*

But the question still remains whether the transfer of his right, to recover from Jarrett, was champertous or tainted with maintenance?

Champerty is a bargain with a plaintiff or defendant in a cause to divide the matter sued for, if they prevail, whereupon the champertor is to carry on the party's suit at his own expense. 2 Story Eq., 1048. Maintenance is an officious intermeddling in a suit which no way belongs to one by maintaining or assisting either party, with money or otherwise, to prosecute or defeat it. 2 Story Eq., 1048.

It appears from the proof that the assignment by Spicer to the McFerrins was absolute and unconditional of all his interest in the judgment that might be recovered, and that $25 was paid for the assignment. In Sec. 1050, 2 Story Eq., it is said: "A party may purchase by assignment the whole interest of another in a contract, or security, or other property, which is in litigation, provided there be nothing in the contract which savors of maintenance; that is, provided he does not undertake to pay any costs or make any advances beyond the mere support of the exclusive interest which he has so acquired."

According to the evidence of the two McFerrins, they purchased whatever judgment Spicer might recover for $25, which they paid, and they assumed no obli-

gation to pay costs or to give any larger sum in the event of the recovery of a greater amount. It was the purchase of Spicer's right of recovery, taking the chances of the result. If the suit was gained, they took all that was recovered except the solicitor's fees. If the suit was lost, their $25 paid was lost. In other words, they risked $25 upon the chance of getting several hundred dollars.

It appears that Spicer was a drinking man; was about to move from the country; and the inference from all the circumstances is, that he was pressed for means. We find him calling on one of the McFerrins (Wm. H.) for $10 the morning he left the county. McFerrin at first refused, but afterwards, in the same conversation, told Spicer if he would let it go upon that "trick"—referring to the Jarrett suit—he would let him have $10. Spicer agreed and McFerrin paid him $10.

It appears also, from the statements of Spicer, made at the depot at Murfreesboro when about starting away, that he had sold the McFerrins four lawsuits, and he was sorry that one of them (Wm. H.) was into it, but as to the other two, he hoped they would lose them, for they had not given him much. He referred, in this connection, to the Jarrett suit. While conversing, Wm. McFerrin came up, when Spicer commenced praising him for being such a clever fellow, and said he had brought him and his family to Union City, and had made him a present

of it. Wm. McFerrin was one of the two brothers that he had just hoped would lose their suits. Spicer was then drinking or drunk.

It appears that Spicer left the country and has had nothing more to do with the suit; nor was his testimony taken as to the character of the assignment, although he is said to be still living in West Tennessee. Viewing all these facts and circumstances, in connection with the fact that one of the McFerrins was Spicer's security for costs, and that the two McFerrins were the main witnesses to prove the usury, we can not resist the conclusion that this transaction was not a *bona fide* assignment of Spicer's claims, but, in the language of one of the McFerrins, a "trick" to get control of the suit and to divide the spoils. We can not but regard the fact that on the morning when Spicer started he called on W. H. McFerrin to give him $10; his refusal, and then consenting, upon Spicer's agreeing to let it go on the Jarrett suit, as evidence that there was an understanding that the $25 was not all that Spicer was to have, in the event the suit should be successfully prosecuted. As we understand the proof, the $25 had already been paid, yet he gives Spicer $10 more on his agreeing to let it go on the Jarrett suit. This is suggestive of a conditional or contingent transfer of the claim, savoring strongly of champerty or maintenance.

We are, therefore, of opinion that there was no error in the decree of the Chancellor, and affirm it with cost.

W. H. Chadbourn *v.* A. G. Henderson.

## W. H. CHADBOURN *v.* A. G. HENDERSON.

1. BILLS AND NOTES. *Mortgage. Foreclosure of.* The execution of a note and mortgage furnishes *prima facie* evidenec as to the true amount of indebtedness, and a settlement of accounts between the parties is matter in avoidance which must be sustained by proof enough to require an account to be taken to overcome such evidence.
2. SAME. *Same Equity of redemption.* Where the equity of redemption is not waived in the mortgage, it is error to decree the sale of such land, free from the equity of redemption, without giving a credit of six months, upon application of the mortgagee.
3. SAME. *Same. Receiver. Rents.* Where the maker of a mortgage, by its express stipulations, is allowed to retain possession of the property, until a foreclosure of the same, he is entitled to the rents, and it is error for the Court to appoint a receiver in such case as the consideration for a continuance.

Code cited: Section 2124, Sub-Secs. 3 and 2.

FROM RUTHERFORD.

Appeal from the Chancery Court. JNO. P. STEELE, Chancellor.

J. W. BURTON for Chadbourn *et al.*

PALMER & RICHARDSON and READY for Henderson.

NICHOLSON, C. J., delivered the opinion of the Court.

This bill was filed to foreclose a mortgage, executed by Henderson to Chadbourn & Co., on the 8th of January, 1868. The conveyance was made to se-

cure the payment of a note of $12,355, dated November 16th, 1867, and due one day after date.

It conveys to Chadbourn & Co. four tracts of land, and provides if the note is not paid in two annual installments, the lands are to be sold for the satisfaction of the debt, but "Henderson to have the full possession until the mortgage is foreclosed, and no steps to be taken by Chadbourn & Co. until the last payment is due."

During the pendency of the cause Henderson filed an affidavit for a continuance, which was granted, but on condition that a receiver be appointed to rent out the lands, the question as to whom the rents belonged being reserved.

On the hearing the Chancellor decreed a sale of the lands, free from the equity of redemption, but giving no credit on the sales.

For Henderson it is argued that the Chancellor erred in decreeing a sale; because it is shown by proof that he was not indebted to Chadbourn & Co. in the amount specified in the note, but that the note was executed subject to a settlement of accounts between the parties, and that upon such settlement Henderson would be found indebted only about $4,000, instead of $12,335, as specified in the note.

This defence was set up in the answer of Henderson, and being matter in avoidance, it devolved on him to make proof enough to require an account to be taken. The execution of the note and mortgage furnishes *prima facie* evidence as to the true

amount of the indebtedness. The proof made by Henderson to overcome this evidence was held by the Chancellor to be insufficient. There was no error in this.

The testimony of the only witness consists of his recollection of a conversation with one of the firm of Chadbourn & Co., in which he was understood to say, that if the lands conveyed were worth $5,000, then the debt was safe. But upon cross-examination, we think, it is made to appear that the conversation had reference to only one of the four tracts conveyed, and that Chadbourn meant that if this one tract was worth $5,000, then the debt was safe, as he had a mortgage on three other tracts. The defence, therefore, is not sustained by the proof.

It is next insisted that the Chancellor erred in holding that the equity of redemption was cut off and barred upon the non-payment of the note. By Section 2124, Sub. Sec. 3, of the Code, lands are redeemable when sold under a deed of trust or mortgage, without a judicial sentence, unless the right of redemption is expressly waived by the deed or mortgage. But, by Sub. Sec. 2, lands so sold shall be redeemable, unless, upon application of a complainant, the Court order the sale on a credit of not less than six months.

In the mortgage before us, there is no power of sale in the mortgagee, nor is the equity of redemption waived. It is, therefore, a case falling under Sub. Sec. 2, and to cut off the right of redemption

it was essential that the sale should have been ordered on a credit of at least six months, and this order should have been on the application of complainant, and so appear in the decree.

It follows that the Chancellor erred in holding that the lands could be sold free from the equity of redemption, without giving a credit of six months, upon the application of complainant. This follows from the fact that there is no waiver of the equity of redemption in the mortgage deed.

It is next argued that the Chancellor erred in granting to Henderson a continuance, on condition that a receiver should be appointed to rent out the lands. There is nothing in the record showing that a receiver was necessary for the preservation of the property, nor does it appear that there was either petition therefor or motion, but the order was made as a condition to granting a continuance on good cause. This was done also in contravention of the express stipulation in the mortgage deed, that Henderson was to retain full possession until the mortgage was foreclosed. Under these circumstances, the appointment of the receiver was erroneous, and the mortgagor, in pursuance of the terms of the conveyance, was entitled to retain possession, and consequently to the rents.

For the error in the decree indicated, a decree of sale will be entered here, for cash, with the

right of redemption. The costs of the cause here and below will be paid out of the proceeds of the sale.

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## Wm. Cannon *et al.* v. George W. Overstreet.

1. Trespass. *Exemplary damages. Evidence. Practice.* In an action of damages for a trespass the defendant pleaded not guilty, on which there was issue, and justification under legal process. The plea of justification was properly demurred to.
2. Same. *Same. Same.* The defendant was allowed to prove his good will toward the plaintiff.

*Held*, such testimony is admissible in *mitigation* only of damages.

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FROM OVERTON.

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Appeal from the Circuit Court. W. W. Goodpasture, Judge.

A. Cullom for Cannon.

J. P. Murry and J. D. Goodpasture for Overstreet.

Deaderick, J., delivered the opinion of the Court.

Overstreet commenced this action of trespass in the Circuit Court of Overton County, against Cannon, Maxfield and Hammonds. Defendants pleaded not guilty, on which there was issue, and justification under legal process. The plea of justification was demurred to, and the demurrer thereto was properly sustained.

Plaintiff's witnesses proved that the defendants came to the house of Overstreet, Cannon declaring their purpose to be to confiscate Overstreet's property, and showed what purported to be a process for that purpose, issued by W. E. B. Jones. He had summoned the other defendants to accompany and assist him in the execution of the process. No violence was resorted to, no threats made, and no property taken or disturbed. They took an inventory of the property, and then took Overstreet's wife's bond that the property should not be removed, one of the defendants becoming her surety in the bond.

It is shown that Overstreet was absent, and that his wife was delivered of a child that morning, of which, however, defendants had no knowledge until they had reached near the house. Mrs. Overstreet was excited, but suffered no injury. All the witnesses prove that defendants acted kindly and gentlemanly, and did nothing to produce alarm or disturbance, claiming only to be doing their duty under process in their hands.

Defendants introduced W. E. B. Jones, who testified that he was the agent of S. R. Cockrill, the Confiscating Receiver for Middle Tennessee; that Cannon was a deputy Marshall, and had been so acting several months; that he delivered the confiscation process, received from the Confederate Court at Nashville, to Cannon, who at first refused to receive it, but afterwards consented, upon the ground that it was

his duty to do so; that no property was taken on the process, and no action taken on the bond.

All this evidence was objected to by plaintiff, and excluded by the Court. Jones was allowed to prove that Cannon was very friendly in his feelings towards Overstreet.

The jury found a verdict for $5,000 against defendants, and on the motion for a new trial, the Judge said he would grant a new trial unless the plaintiff would remit $4,000 of the recovery, which was done, and thereupon the jury was discharged and judgment rendered for $1,000, from which defendants have appealed in error to this Court.

We are of opinion that in mitigation of damages, the testimony of Jones was admissible.

The Court had charged the jury that if the jury were satisfied that the defendants acted without malice, force or oppression, they should give the actual damage or pecuniary loss sustained; but if they acted through malice or ill-will towards plaintiff, or used force or oppression, they might give exemplary damages. The evidence rejected tended to disprove the existence of malice.

While this evidence, in the state of the pleadings, was not admissible in justification of the trespass, it was competent, and should have been admitted upon the question of damages.

For the error in rejecting this testimony, the judgment is reversed.

W. A. Clark, in Error, *v.* J. A. Jarrett.

# W. A. Clark, in Error, *v.* J. A. Jarrett.

New Trial. *Party misled by remark of Court.* Where a party has been misled by a remark of the Court as to the time at which his case would stand for trial, and for this reason is unprepared when his case comes on for hearing, a new trial will be granted.

FROM CANNON.

Appeal from the Circuit Court. W. H. Williamson, Judge.

Jas. S. Barton for Clark.

J. W. Burton for Jarrett.

McFarland, J., delivered the opinion of the Court.

Although this Court seldom interferes with the discretion of a Circuit Judge in a matter of continuance or new trial for additional testimony shown by affidavit, yet we are constrained to do so where it is made to appear, as it does in this case, that the ends of justice propably require it.

The plaintiff in error, who was defendant below, used, as we think, reasonable diligence in preparing his defence, and he shows by his affidavit that he was misled by a remark of the Judge when the cause was first called, that the cause did not stand for trial, although the Judge made this remark from a misunderstanding of the statement of counsel.

W. A. Clark, in Error, *v.* J. A. Jarrett.

Being misled by this statement, and hearing of sickness in his family, he left the Court and went to his home in the adjoining county. His attorney applied for a continuance, giving all the reasons of which he was informed.

The affidavit shows that by his absence, and the absence of his witnesses, plaintiff in error was prevented from making his defence. The merits of his defence are specifically set forth, and the names of the witnesses given. The injunction, which had hitherto stayed the progress of the cause, had been very shortly before dissolved. No copy of the decree dissolving the injunction had been filed. It was considered doubtful, as it perhaps might well be, whether the cause stood for trial at that Term.

It is true that, as a general rule, new trials ought not to be granted on an affidavit of newly discovered testimony, without the affidavit of the witnesses by whom the new proof is to be made; but here the party was misled and prevented from making his defence at all, and the application of his attorney for a continuance refused.

Upon the facts disclosed, which we need not fully set forth, we reverse the judgment, and grant a new trial.

# H. L. Wright *v.* Wm. Wright.

Boundary. *Conventional line. Parol. Agreement as to.* Where a party who has never had possession of land in controversy fails to show either title or interest in the same, any agreement made with him as to the boundary lines is without consideration, though made by parol or otherwise, and not binding upon the parties.

Cases cited: Leivellen *v.* Overton, 9 Hum, 79; Rogers *v.* White, 1 Sneed, 74.

FROM OVERTON.

Appeal from the Circuit Court. S. M. Fite, Judge.

J. E. Goodpasture for H. L. Wright.

J. H. Wendle for Wm. Wright.

Deaderick, J., delivered the opinion of the Court.

This is an action of ejectment from the Circuit Court of Overton county. Judgment upon the verdict of a jury was rendered in favor of plaintiff below, from which defendant appealed, in error, to this Court.

The error assigned is in the charge of the Court. The Court instructed the jury that although the defendant had "shown no title papers, if he had an actual possession of any of the disputed territory at the time a conventional line may have been made," he had such a possessory right as would make any agreement, though by parol, he and the plaintiff may have made binding

on the parties, provided the true boundary was unknown, and the conventional line was made to settle the dispute as to the line. But as defendant has shown no proper title to any lands, he must show that he, at least, had some possessory right, by having a part of the disputed land in possession, to authorize him to enter into an agreement to make a conventional line."

We do not think there was any error in this charge of which plaintiff, in error, can be heard to complain. The defendant below introduced no title papers to the land adjoining plaintiff; he proved no possession of any part of the land in dispute, and, consequently, failed to show that he had any title to or interest in the land in controversy.

In 9 Hum., 79, *Leivellen* v. *Overton*, this Court held, "that a party having no title to the land had no legal interest in the establishment of the boundary. An agreement entered into with such party was without consideration, and was not mutual." To the same effect is the case of *Rogers* v. *White*, 1 Sneed, 74.

Let the judgment be affirmed.

E. B. Bledsoe *v.* Mitchell Wright.

# E. B. Bledsoe *v.* Mitchell Wright.

Attachment against non-Resident. *Judgment by default may be set aside. When.* It is not the action of the Court, but that of the party complaining, which is limited to twelve months. The party having done all required of him, the delays or continuances, or incompetency of Courts, or their failure to meet, cannot divest him of the right invested by his application.

Code cited: Section 3529. Declaration of Rights, Article I, Section 17.

FROM FENTRESS.

Appeal from the Circuit Court. W. W. Goodpasture, Judge.

Goodpasture & Jones for Bledsoe.

Young & Jenkins for Wright.

Turney, J., delivered the opinion of the Court.

"In all cases of attachment sued out because the defendant resides out of the State, or has merely removed himself or property from the State, the judgment or decree by default may be set aside upon application of the defendant, and good cause shown, within twelve months thereafter, and defence permitted upon such terms as the Court or Justice may impose." Code, Section 3529.

"All Courts shall be open, and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and

right and justice administered without sale, denial or delay." Section 17 of Article I, Declaration of Rights.

In contemplation of the organic law the Courts are always open.

The Statute quoted, construed by the light of the constitutional ordinance, gives to the party claiming and asking the benefits, the full term of twelve months, within which to make the application and show cause. The cause is to be shown in the application, the address of the application to the proper tribunal, and the filing of it in the right office, is a compliance with the law. The question whether sufficient cause has been shown is one to be determined in Term time, when the motion to set aside the judgment or decree by default is made, that motion being based upon the application, and cause shown thereby within the twelve months. The question to determine is, is the application made, and good cause shown within twelve months, and not that the judgment should be set aside within twelve months. It is not the action of the Court, but that of the party complaining, that is limited to twelve months. The party having done all required of him, delays and continuances by Courts, their incompetency, as in this case, or their failure to meet, can not divest him of the right invested by his application, showing good cause.

Reverse the judgment.

Walter Keeble, in Error, *v.* R. T. Tompkins, Ex'r, etc.

# WALTER KEEBLE, in Error, *v.* R. T. TOMPKINS, Ex'r, etc.

BILL SINGLE. *Action on. Statute of Limitation.* Where the cause of action upon a bill single acrued before the 1st of October, 1858, by Section 41 of the Code, the Statutory Limitations prescribed by the Code will not apply.

Code, Sections 47, 1804, 2769, 2775.

FROM RUTHERFORD.

Appeal from the Circuit Court. W. H. WILLIAMSON, Judge.

E. D. HANCOCK for Keeble.

PALMER & RICHARDSON for Tompkins.

MCFARLAND, J., delivered the opinion of the Court.

This action was brought upon a bill single executed on the 1st day of January, 1858, and due one day after date. The action was commenced on the 6th day of March, 1871. The defendant pleaded the Statute of Limitations of six years. A demurrer to this plea was sustained by the Circuit Judge, and the only question for our consideration is, was the holding correct.

Previous to the adoption of our present Code (May, 1858), there was no Statute of Limitation applicable to an action of debt founded upon a bill single. By the Code, Section 1804, the use of private seals in written contracts, except the seals of corporations, is abolished, and written contracts left to stand upon the same foot-

ing in this respect, and the limitation of six years prescribed by Sections 2769 and 2775, for actions "on contracts not otherwise expressly provided for," is certainly comprehensive enough to embrace the present action, and as it applies duly to the remedy, we make no question as to the power of the Legislature to make the limitation applicable to causes of action then existing. But among the provisions applicable to the whole, Code, Section 47, enacts that "causes of action accruing before the 1st of October next, shall not be affected by the limitation herein provided, but shall be subject to existing limitations, and where the limitation is uncertain, by reason of its application to forms of action abolished by this Code, the longest time prescribed for the commencement of an action in any form for such cause shall be allowed." As the cause of action in the present case accrued before the 1st of October, 1858, the limitations prescribed by the Code do not apply. This is the plain and unambiguous meaning of the language of Sec. 47, above set forth, and the law as to the limitation of an action founded upon a bill single remained as it existed at the adoption of the Code, and we have said there was no Statute then limiting the time in which an action upon a bill single could be brought.

We think there was no error in the action of the Circuit Court, and the judgment will be affirmed.

# B. H. Lynn *v.* Geo. Beatty.

COMPROMISE. *Duress. Evidence of not admissible. When.* In the absence of threats of any sort, and there being no special evidence of duress prior to a compromise, it is incompetent to admit testimony, that after the compromise threats had been made against the plaintiff touching the litigation.

FROM OVERTON.

Appeal from the Circuit Court. W. W. GOODPASTURE, Judge.

J. H. WENDLE for Lynn.

J. D. GOODPASTURE for Beatty.

SNEED, J., delivered the opinion of the Court.

This is an action of trover for the conversion of a horse. The verdict below was for the plaintiff, and the defendant appealed in error. It seems that the plaintiff Lynn had possession of the horse in controversy, and the defendant Beatty had brought his action of replevin to recover him before a justice. The parties met together and settled this controversy before trial, the plaintiff Lynn agreeing to surrender the horse to Beatty, and the latter agreeing to pay the costs of that proceeding, which he did. Afterwards, Lynn brought this action of trover against Beatty for the alleged conversion of the same animal, and Beatty relies

on the former compromise and settlement as a defence to the action. On the part of Lynn it is contended, and sought to be shown, that he agreed to the said compromise because he was afraid of the consequences of further contending for the horse, from the violence of certain Union men in the vicinity who were connected with Beatty, and who would, perhaps, espouse his quarrel.

It is shown, however, that the defendant Beatty is a "clever and peaceable" man, to adopt the words of the witnesses, that no threats of any sort were made against Lynn by any one prior to the compromise, and no special evidences of duress then existing. On the contrary, the plaintiff admits that he surrendered the horse willingly, but alleges that he did so because he believed that at the time he had no chance. It is shown that much terror existed in the country at that time, on account of the lawless conduct of certain men, some of whom were related to defendant Beatty. Under this state of facts, in the absence of any proof of duress prior to the compromise, the Court overruled the objections of defendant, and permitted proof to be adduced, that after the compromise threats had been made against the plaintiff Lynn touching the litigation. This was error.

Reverse the judgment.

R. F. Wasson, Adm'r of Benj. Lillard, Deceased, *v.* Wm. Garrett, *et als.*

# R. F. WASSON, Administrator of BENJAMIN LILLARD, Deceased, *v.* WM. GARRETT, *et als.*

TRUSTEE. *Rights of beneficiaries to recover money paid by the trustee through mistake. Fraud.* Where a trustee wrongfully, or by mistake, pays money to a third person, supposing he was relieving the trust property from an incumbrance, he will not thereby be relieved from responsibility in the matter of his trust to the beneficiaries under the deed, and whatever the trustee's rights may be, the beneficiaries, in the absence of fraud, are entitled to no relief against the party wrongfully receiving the money.

FROM RUTHERFORD.

Appeal from the Chancery Court. JNO. P. STEELE, Chancellor.

B. F. LILLARD for Wasson.

EWING & HANCOCK and CHAS. READY for Garrett and others.

FREEMAN, J., delivered the opinion of the Court.

Charles Watts, in April, 1865, made a deed of trust to Benjamin Lillard, complainant's intestate, conveying certain lots in Murfreesboro to secure said Lillard as his surety on certain notes. After the death of Lillard, defendant Saunders was appointed trustee in his stead, and proceeded to sell the lots in accordance with the requirements of the trust. They were bought by different parties, but failed to bring an amount sufficient

to pay the debts on which Lillard was surety. It appears that part of the lots purchased at this sale had, previous to the execution of the deed of trust, been levied on under an execution in favor of defendant, A. T. Reeves, issued on a judgment rendered by a Justice of the Peace of Rutherford county, and the papers returned to the Circuit Court for order of sale in, perhaps, April, 1861. These papers were lost or mislaid during the war, but were supplied after the war, and an order of sale issued, directing the sale of the lot to satisfy the judgment of Reeves, under which it was sold, and the Sheriff returns that it was bought by Reeves, or bid off by him for his debt, costs and commissions."

A paper is filed as an exhibit, which appears to be a statement that the defendant Garrett was the purchaser of said lot, on which he, as a judgment creditor and purchaser, advances his bid, $186 50, and files his receipt in the office of the Circuit Court, as required by law in such cases.

Saunders, the trustee, supposing the sale and advance bid to be regular on the part of Garrett, paid Garrett over $500 in discharge of his claim on the lot, to relieve it of this supposed incumbrance. It is now claimed in this bill that this money was paid by mistake, and that Garrett had no lien on the land or charge on the same; that he was not the purchaser, and that the sale was void, and this money paid by mistake.

The bill seeks, on the part of the administrator of Lillard, to have this money paid back by Garrett. A

demurrer was filed by defendants, and sustained by the Chancellor, the bill dismissed, from which there is an appeal to this Court.

It is obvious that whatever may be the rights of Saunders, the trustee, who paid the money, that complainant has no right to the relief he seeks. If Saunders wrongfully, or by mistake, paid money to Garrett, supposing he was relieving the trust property from an incumbrance, under the facts as charged in the bill, he will not thereby be relieved from responsibility in the matter of his trust to the complainant, as beneficiary under the deed. But complainant has no right to call on Garrett to refund, unless there had been fraud and collusion between the trustee and Garrett in the misappropriation of part of the trust fund. If Saunders chooses to take the responsibility of letting this payment stand, complainant cannot object, no fraud or collusion being alleged as between Saunders, the trustee, and Garrett, the supposed creditor.

Without further discussion of the question, we affirm the decree of the Chancellor, with costs.

Wm. A. Johnson *v.* Levi Wade.

## Wm. A. Johnson *v.* Levi Wade.

1. Principal and Agent. *Instructions. Must obey. When.* Where cotton has been shipped to a factor, and a bill drawn against the same, with instructions to sell before or at maturity of the bill, the factor must obey the instructions of his principal, and on failure to do so will be held liable for any loss accruing thereby.

FROM RUTHERFORD.

Appeal from the Circuit Court. W. H. Williamson, Judge.

E. H. Ewing and E. D. Hancock for Johnson.

J. W. Burton for Wade.

Nicholson, C. J., delivered the opinion of the Court.

McFarland, J., dissenting.

On the 24th of April, 1866, Levi Wade drew his bill for $5,000 on Wm. A. Johnson, at New Orleans, payable in thirty days, that is, on the 24th of May, 1866. On the 28th of April, 1866, he shipped to Wm. A. Johnson thirty-eight bales of cotton, which were received by him in New Orleans on the 4th of May, 1866, twenty days before the bill matured.

On the day of the shipment of the cotton, to-wit, on the 28th of April, 1866, Wade, through his agents, McAlister & Co., advised Wm. A. Johnson of the shipment, and said to him: "Also thirty-eight bales cotton

on account Levi Wade, who has drawn on you for $5,000, at thirty days, we believe. Mr. Wade leaves the sale of his cotton to your discretion. Of course he wants to meet his bill,"

The cotton was not sold at the maturity of the bill, and not until the 13th of July, 1866, at which time it brought about $3,500. Johnson having paid the bill at maturity, applied the $3,500 to re-emburse his advancement, and for the balance, $1,500, brings suit in the Circuit Court of Rutherford.

Wade resisted the suit below, upon the ground that he was damaged by the failure of Johnson to sell the cotton before or at the maturity of the bill, at which time the cotton could have been sold for an amount sufficient, or nearly so, to pay the bill; but that by delaying to sell until the 13th of July, 1866, on account of the decline in cotton, it only brought $3,500.

The deposition of Johnson was taken, and he states: "We made every effort to sell this cotton in time to meet the bill for $5,000, and had it on the market daily, from the date of its receipt until sold, on the 13th of July, 1866; but the cotton being low in quality, stained, dirty, and deficient in staple, was difficult of sale. It is our custom, when we accept bills drawn against shipments of cotton, to meet the bills at maturity by sale of the cotton. This we would have done in Wade's case, had it been possible to have found a purchaser; but the cotton was of an unsalable discription, being, as we have stated, low in quality, stained, and deficient in staple, and for this reason

could not be sold sooner, and I sold it for the best price I was able to obtain after its receipt."

On cross-examination Johnson states that at the time the bill fell due—24th May, 1866—"good ordinary cotton could have been sold for from twenty-seven to thirty-three cents, but I could not make a sale of Wade's at an earlier date, because of its condition and quality.

It is clear from Johnson's testimony that he understood himself as being required, either by the instructions given him, or by his custom in such cases, to sell before or at the maturity of the bill. He excuses himself upon the ground alone of his inability to sell, in consequence of the unsalable condition of the cotton, and puts no reliance on the fact that he was intrusted with a discretion as to the time of selling.

The Circuit Judge charged the jury "that if they found that Johnson could not sell the cotton as instructed, and used ordinary diligence to effect a sale, but could not do so, you will find for him."

Wade had adduced evidence to show that the cotton was of good quality, and not stained, and that at the date of the maturity of the bill it was worth from thirty-one to thirty-three cents.

Upon the issue so made by Johnson, the jury found for Wade—unless they were controlled in their verdict by the construction placed by the Court on the instructions to Johnson.

On this point the Circuit Judge charged: "The Court is of opinion that the letter of instructions read

to you as evidence limits the plaintiff's discretion as to time of sale to the maturity of the bill which defendant had drawn on him, and that he was bound to sell in time to meet it at maturity."

It is clear that Wade's object in making the shipment of cotton was to have funds in Johnson's hands, ready to meet the bill at its maturity. The cotton was received by Johnson about twenty days before the bill matured. We think the meaning of the instructions was, that Wade gave Johnson a discretion from the date of the receipt of the cotton until the maturity, as to the sale of the cotton, "but, of course, he wants the cotton to meet the bill," that is, if Johnson, in his discretion, should not sell before the maturity of the bill; that then the bill should be met by a sale of the cotton. Such was, manifestly, the understanding of the instructions by Johnson, and we think he understood them correctly, and that they were correctly construed by the Circuit Judge in his charge to the jury. Whether, therefore, the jury based their verdict on the charge of the Court as to the proper construction of the instructions, or on the evidence as to the excuse relied on by Johnson for his failure to sell in time, we are of opinion there is no error, and the judgment must be affirmed.

Wm. Puckett *v.* Hiram Jenkins and Wife, *et al.*

## Wm. Puckett *v.* Hiram Jenkins and Wife, *et al.*

1. Sale of Land by Chancery Court. *Party procuring sale cannot be relieved of his purchase. When.* A party who has procured a sale of land by a Chancery Court, and been allowed to purchase under said sale, cannot come into the same Court by bill and ask to be relieved of his purchase on the ground of errors in the proceedings, if those errors are denied by answer, without showing that they exist.
2. Same. *Presumptions of law.* A party asking the recision of such a sale must prove the errors complained of, as the presumption of law is in favor of the validity of such a sale.

   Cases cited: Boyer *v.* Porter, 1 Tenn., 258; Mullens *v.* Aikens, 2 Heisk., 542.
3. Same. *Judgment by motion on sale notes. Parties to the original proceeding. No revivor necessary. When.* Where the Clerk of the Chancery Court takes judgment by motion on sale notes for land sold under decrees of the Court, such judgment is only an incidental proceeding, and the failure to revive the suit against the representatives of persons who were parties to the original bill will not affect the validity of such a proceeding.

FROM RUTHERFORD.

Appeal from the Chancery Court. Jno. P. Steele, Chancellor.

Chas. Ready for Puckett.

E. A. Keeble for Jenkins.

Freeman, J., delivered the opinion of the Court.

This bill is filed by W. A. Puckett to enjoin a judgment against him and his sureties, on notes given for purchase of land sold by order of the Chancery Court of Rutherford county, and to have said sale set aside. The land was ordered to be sold on bill filed by complainant and Benjamin F. Puckett, executors of the will of Charles Puckett, deceased, for partition, or distribution of the proceeds among the legatees of said

Charles Puckett. The sale was made by the Clerk and Master, in December, 1859.

The bill charges that the title obtained by complainant will be defective by reason of certain defects in the proceedings under which the sale was ordered.

First, it is alleged that some ten of the heirs or legatees were not properly before the Court; that the minors among said legatees did not have *guardians' ad litem* legally appointed for them; and those who had regular guardians did not have answers filed for them.

These, with all similar allegations, are denied by the defendants who answered the bill, and the minutes of the Court are referred to as remaining in Court, reciting all the facts necessary to the entire regularity of the proceedings, the papers in the cause having been lost or destroyed during the war. But on looking into the record before us, we find none of the proceedings in the original case, nor anything from which we can see whether the proceedings were regular or otherwise. The case stands thus: A party who has procured a sale of land by a Court of Chancery, and been allowed to purchase under said sale, comes into the same Court by bill, and asks to be relieved of his purchase on the grounds of errors in the proceedings—charges certain specific errors, and when these are all denied, goes to trial without presenting the slightest proof of his allegations, and then asks that a decree annulling the sale be made in his favor.

We do not think this can be done under any sound principle known to us. If the defects charged really

were known to exist, the complainant, who was party to the proceedings, and complainant in it, could as well show them as the defendants. He has alleged them as the ground for the relief he seeks, and having an equal opportunity to show them as the defendant, it is no hardship on him that he shall be required to do so in a case like the present. It is urged that this is to require him to prove a negative. We do not think so; he has affirmed the existence of defects in a judicial proceeding, which, if they exist, will appear by reference to the proceedings on file or of record in Court. We cannot presume in his favor that such defects exist, nor give him a decree because defendants do not furnish contradictory proof of his allegations. The fair presumption of law is in favor of the regularity of the proceedings of all Courts of general jurisdiction; and when a sale is attacked as invalid, made under the authority of such a Court, it is but fair that the party maintaining this proposition should be required to show the invalidity by presenting the defect to the Court. The defendants have, however, complied with the general rule in cases of private sales, when the vendee seeks to enjoin the purchase money and have sale rescinded, on an allegation that the vendor had no title. He has referred to matters of record as existing in the Court when the bill was filed, which, if true, meet the objections taken to the proceedings by complainant in his bill. This was sufficient, and complainant was then bound to point out and show defects existing in the records referred to, which were fatal to the bill. *Boyer*

v. *Porter*, 1 Tenn. R. (Coop. Ed.), 258; *Mullens, et als.*, v. *Aikens*, 2 Heisk., 542.

There might be other reasons which would preclude the complainant from the relief sought on this ground, but we need not further discuss the question, as we are well satisfied that in no aspect of the case, on this question, is he entitled to the relief sought.

It is insisted, however, that the judgment by motion on the notes for the purchase money given to the Clerk and Master is void, because several of the defendants to the original proceeding had died previous to taking said judgment in favor of the Master, and the suit had not been revived in the name of their representatives. This objection is not well taken. The judgment on the note is only an incidental proceeding in the cause, by way of effectuating the sale made by the Court, and getting the purchase money into Court for distribution. The defendant legatees who were entitled ultimately to the funds, were not necessary parties to the proceedings under the motion. No decree could have been given against them in that case. The Clerk, as the officer of the Court, only asked the aid of the Court to collect the notes given at the sale. This cannot affect the validity of the judgment on the notes.

The other ground stated in the bill of employment of puffers to bid at the sale, is not made out by the proof. On the whole case, without further discussion, we can see no possible ground on which to say the Chancellor erred in dismissing complainant's bill, and affirm his decree with costs.

Chesley Williams, Adm'r, *v.* J. B. Palmer, *et als.*

## CHESLEY WILLIAMS, Adm'r, *v.* J. B. PALMER, *et als.*

GUARDIAN. *Must account for profits. When.* A guardian purchasing land of his ward, and selling for a profit, when it was his duty to protect such ward, will be held to account for the principal and all profit. Story's Equity Jur., Section 322.

APPEAL. *Distinct right. Case not brought up as to all. When.* A case involving wholly separate and distinct rights between different parties, depending on different questions, an appeal by one party does not bring up all matters involved in the case.

ALLEGATION. *No issue. Decree.* The allegation of an attachment lien existing in another case, which allegation is not put in issue by the answer, and no proof taken thereon, cannot be made a matter of adjudication.

FROM RUTHERFORD.

Appeal from the Chancery Court. A. S. MARKS, Chancellor.

CAMPBELL, MCEWEN & BULLOCK for Williams.

T. W. TURLEY and E. A. and H. R. KEEBLE for Palmer, *et als.*

MCFARLAND, J., delivered the opinion of the Court.

Upon the death of Blount Jordan, and the death of one of his children, unmarried and without issue, his three remaining children became entitled to his lands in Rutherford county. Thomas M., one of his heirs, conveyed his interest in the estate to Alexander Winn. Said Winn and John M. Jordan, and Eliza J., the wife of John C. Bostick, the two latter being the other two children of Blount Jordan, were then the owners of the land. The widow of said Blount Jordan, Laura C., who married James Hamilton, was entitled to dower.

Chesley Williams, Adm'r, *v.* J. B. Palmer, *et als.*

A proceeding was instituted in the Chancery Court for the sale of the lands. John M. Jordan was a minor, and the petition was answered by his regular guardian, Williamson Jordan. The petition charged that it would be to the interest of all parties to sell the land as a whole, and pay the widow a fixed sum in lieu of dower. A decree was pronounced for the assignment of dower, and assuming from the proof that after the assignment of dower the land could not be partitioned without injury, directs a sale. The dower was not assigned for the reason, as it seems, that Alexander Winn, Williamson Jordan and John C. Bostick, purchased from Mrs. Hamilton her dower interest, giving their notes for $1,000 for the same. The land, however, was sold. One part was purchased by J. P. Miller, the other part by Alexander Winn. Their notes, with security, were given in accordance with the terms of sale, and the sale was confirmed, but the title not then vested. It is now conceded that Alexander, in making his purchase, did so for the joint benefit of himself, Williamson Jordan and John C. Bostick. Soon after their purchase they resold the land bought by them in two parcels, making a large profit. On this re-sale they received $1,100, but the remainder of the notes given by their sub-vendees remained unpaid for some time, and the proceeds were brought under the control of the Court in the present case, the attorney who had collected the money being made a party. The note given by Winn, Bostick and Williamson Jordan, for the purchase of the dower, was paid out of this fund,

but the notes given by Winn upon the purchase of the land remained unpaid. Williamson Jordan, Winn and Bostick all died, the latter having been declared a bankrupt before his death. In this attitude, and while the first cause still remained in Court, the present bill is filed by the administrator of Williamson Jordan to settle the rights of the parties to the fund. The personal representatives of Winn and Bostick, and the assignee in bankruptcy of the latter, are made defendants, as well as John M. Jordan and Eliza J. Bostick. From the decree of the Chancellor, settling the rights of the parties, the complainant, the administrator of Williamson Jordan, alone has appealed. That part of the decree which affects his rights is to the effect that at the time Williamson Jordan purchased a part of the lands, he was the guardian of John M. Jordan; he had, with others, instituted the proceeding for the sale of the land; he used no funds of his own in making the purchase; that he could not make a profit while it was his duty to protect the interest of his ward; and, therefore, John M. Jordan had the election to take the benefit of the purchase made by his guardian, and that he is entitled, in receiving his share of the proceeds of the land, to have the benefit of all profit made by Williamson Jordan upon the re-sale, crediting him with any sum paid for the purchase of the land.

We think this proposition is manifestly correct, in fact, we have been furnished with no argument by the learned counsel of the complainant against the correctness of this conclusion. It would be a startling doc-

trine to announce that under such circumstances the guardian could purchase for his own benefit. See Story's Equity Jur., Section 322.

It is argued, however, that the Chancellor erred in decreeing to Mrs. Bostick one-third of the fund arising from the sale. It is argued that the confirmation of the sale converted the land into personalty, and although the money was not reduced into possession by John C. Bostick, still his rights attached, if not to the whole fund, at least to that part constituting the profit upon the re-sale, as it is maintained the relation of husband to Mrs. Bostick did not prevent him from purchasing for his own interest.

We express no opinion upon these questions, for the reason that we do not regard them as before us. Neither the assignee in bankruptcy, or the personal representative of Bostick, have appealed. If Mrs. Bostick is not entitled to the fund, then it must belong either to the assignee or administrator. If they are content with the decree it must stand. It being a case involving wholly separate and distinct rights between different parties, depending upon different questions, it is not a case where the appeal of one party brings up all matters involved in the case. If the parties interested in the decree upon this question are content, it can not be disturbed at the instance of one having no interest. But it is argued that the complainant has an interest in the share of Bostick as an attaching creditor. The ground of this is as follows: "The bill in this case, after setting forth the facts, uses this lan-

guage: "If this view of the question be the correct one, then the said A. W. Moss, as assignee in bankruptcy, is the owner of said John C. Bostick's part of the proceeds of the sale, and certainly his part of the profits, unless indeed the same should be, as your orator believes and charges the same are, bound by the lien of an attachment or attachments from the Chancery Courts at Franklin, in the case of your orator, as administrator of Williamson Jordan against Narcissa J. Winn, *et als.*, etc.

This is the only allusion to the subject, except, as part of the prayer, he asks that his rights against Bostick's share be declared and enforced. The answers take no notice of this allegation, and the record of the cases referred to are not read as evidence upon the hearing, nor was there any evidence or notice taken of this statement. We think it very clear that upon this record we can make no adjudication in regard to the attachment proceeding thus incidentally referred to. The complainants claim, its nature, justness, or amount is not put in issue, there is no attachment in the present case, and surely we can not determine the validity or effect of the attachment in the case referred to. We are fully satisfied that we can make no decree on this question. As to the state, therefore, of the fund claimed to have belonged to John C. Bostick, we hold that the complainant has no interest, and the question is not brought up by his appeal. John M. Jordan is not entitled in this case to a decree against complainant, as administrator of his guardian, for his

share of the $1,100, collected by him in his lifetime. He filed no cross bill asking this relief. He will have to pursue another remedy as to this.

No other question being made, the decree of the Chancellor will be affirmed, with costs.

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JNO. A. WOOD *v.* B. L. and W. H. MCFERRIN, *et als.*

STAYOR. *Release of. Extension of time.* The acceptance by a judgment creditor of the benefits of a deed of trust made by the judgment debtor, does not release the stayor upon the judgment, though the time given the trustee to wind up the trust extends beyond the stay.

Cases cited: Am. Lead. Cases, 5 Ed., p. 444. United States *v.* Hodge, 6 How,, 79; Lea *v.* Dozier, 10 Hum., 451.

ASSIGNMENT OF JUDGMENT. *Stayor must pay full amount.* Though the judgment creditor assign his judgment at a large discount, yet the stayor must pay the assignee the full amount. Not in conflict with Petty *v.* Hannum, 2 Hum., 102.

EXCEPTIONS TO ANSWER. *Clerk and Master to act upon.* Exceptions to an answer must first be brought before the Clerk and Master for his action, then by appeal to the Chancellor.

Code, Section 4402, *et seq.*, Ch. Rules 1, Section 5.

INJUNCTION BOND. *Securities. Sale.* Where the injunction, in part, is to enjoin the sale of a lot levied upon by execution, the securities upon the bond, though liable for the entire debt enjoined, are entitled to have a decree for a sale of the lot first, and to be made responsible for the balance only.

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FROM CANNON.

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Appeal from the Chancery Court. B. M. TILLMAN, Judge.

J. W. BURTON, J. S. BARTON and J. L. FARE for Wood.

BRIEN, CANTRELL & GRIBBREL for McFerrin *et als.*

NICHOLSON, C. J., delivered the opinion of the Court.

Jno. A. Wood *v.* B. L. and W. H. McFerrin, *et als.*

This bill is filed by the complainant as stayor of two judgments, one in favor of Martin Pedle, Hambrock & Co., against the firm of Carmichael & St. John, recovered about the 14th of November, 1860, for $497 79; the other by Payne & Cohart, of date 29th of September, 1860, for $280. These judgments were recovered before a Justice of the Peace for Cannon county, and stayed by complainant. It is charged in the bill, as one of the leading grounds for the relief sought, that in November, 1860, Carmichael & St. John executed a deed of trust, by which they conveyed a large amount of assets, consisting of their stock of merchandise, of the value of between $6,000 and $7,000, together with a large amount of debts, to one Ed. J. Wood, in trust, to sue and collect, and to appropriate proceeds of the trust property and assets to the payment of the large list of debts specified, in the order of preference required in said deed, among which debts are included the two judgments above referred to, they being part of what is known in the deed as preferred debts. It is claimed in the bill, that as this trust was not to be closed, by its terms, until January, 1862, that it amounts to such a contract for delay, after acceptance by the beneficiaries, as should discharge the complainant as stayor, and that he is, in fact, so discharged. The deed of trust is made part of the bill, as an exhibit. On looking to the terms of this deed of trust, it appears that certain notes and judgments, among them the judgment in this case, were to be paid first, and that the trustee was to sell the goods and collect the assets, and first appropriate the money

to pay their preferred debts, after reserving expenses of executing the trust, and if all the indebtedness, both preferred and second class claims, were not paid by the 1st of January, 1862, then the balance of the goods on hand were to be sold by the trustee, as he thought most advantageous to all the parties concerned, and pay the indebtedness remaining.

It is clear, there is no express contract for delay in the deed, on the contrary, the inference is very fair from the face of the deed, and the fact that the debts of the firm assigned amounted to about $13,000, which are to be collected by the trustee; that it was supposed and contemplated that the preferred debts, at any rate, would be discharged in a less time than the period referred to for finally closing the trust; in fact, that they would be discharged as fast as the debts could be realized.

There being no contract for delay, but only such a security as we have stated above, the question is, whether taking this security, under the circumstances, released the stayor. We think it did not. The rule is thus laid down in Am. Lead. cases, 5 Ed., 1871, p. 444: Taking a mortgage or bill of sale, conditioned for payment at a future day, is not a suspension of the debt, unless it is expressly so agreed. *Prima facie*, such an instrument is an additional or collateral security, and leaves the existing remedies of the creditor against both principal and surety intact. See *United States* v. *Hodge*, 6 How., 79. In the case of *Lea* v. *Dozier*, 10 Hum., 451, this principle is substantially adopted by our own Court, it being held, in that case, that

while there was no contract, in express terms, to delay for the six months the deed of trust had to run, yet such a contract was necessarily implied from the language of the instrument, and the Court finding such a contract a binding agreement for delay, held the surety released. Finding no such contract expressed in terms, nor necessarily implied in the language of the deed of trust in this case, we hold that there can be no release of the surety by reason of the making of the deed of trust by the principals, nor its acceptance by the beneficiaries, even if such acceptance should be clearly made out. This deed neither suspends the remedy of the creditor to enforce his debt, nor works any injury, in fact, to the surety, and on one of these grounds we believe all the cases on this subject agree. On the contrary, the taking the collateral security of the trust deed was an advantage to the security, as it, if properly administered, tended to his relief by the specific appropriation of a fund to its payment, and that in preference to other creditors, and in addition, the stayor might, at the end of the stay, have paid the debt, had judgment by motion against the principals, and been entitled for his indemnity, to be substituted to the rights of the creditors under the trust deed. The complainant must fail of relief on this ground.

It appears that one or both of these judgments had been assigned to the Messrs. McFerrin, for the sum of $300, a large discount. It is now insisted, that a recovery can only be had for the amount actually paid, under the authority in the case of *Petty* v. *Hannum*, 2 Hum., 102. That was a case where the consideration

of the note had failed, but it had been negotiated at a discount of 33⅓ per cent., perhaps. The Court held, that under this state of facts, the note was only negotiated in due course of trade for the amount actually paid for it, with interest. The principle, thus announced, has no application to the case before us. There is no pretence of a failure of consideration, nor does the question arise. As to the questions raised in argument on exceptions filed to the answers of the two Northern firms, we need but say, that as to the first series of exceptions, because of the answer not being sworn to by the parties themselves, but by the attorney, we do not see that any action was ever taken, either by the Clerk and Master or the Chancellor. It appears that another answer was filed by one of these firms after this, to which exceptions appear in the record, which exceptions were stricken from the file by the Chancellor, because not filed within the twenty days allowed for excepting to an answer. We need not undertake to say how the facts were as to this matter, as it appears, from the face of the exceptions, that they were filed in open Court, and not before the Master, and no action of the Master was involved in them. They could only be filed for the action of the Master, and be properly before the Chancellor on appeal from the Master's decision. See Code, Section 4402, and subsequent sections, and Ch. Rules. The complainant having failed to have his exceptions brought to the attention of the Master, or his decision on them, and

having proceeded with the proof, and gone to trial on the issues presented in these answers, can not now assign these matters for error in this Court. We can only reverse for errors affecting the merits of the case. Code, Section 4516. The only other question we deem it proper to notice is as to the extent of the liability of the sureties on the injunction bond. The condition of this bond is: "Now if the said Jno. A. Wood shall prosecute said injunction with effect, or in case he fails, to pay all costs and damages as shall be awarded and recovered, etc., and shall, moreover, abide by and perform such orders and decrees as the Court may make in this case, and pay such damages as the Court may order, then to be void," etc. The Chancellor dissolved the injunction, on answer, as to the debt for $497.97, and ordered a judgment and execution against Wood and his sureties on the injunction bond for this debt upon the execution of a bond, to refund in case of a decree for complainant. In this he probably erred, as the injunction, in part, was against selling a lot that had been levied on as property of Wood, and the sureties probably were entitled to have this lot sold on dissolution of the injunction, in part or whole discharge of their liability. But as we hear the case *de novo* in this Court, the proper decree can be rendered here. We think the fair construction of the bond makes the sureties liable for the debts enjoined, but the lot levied on can be sold first for their exoneration, if still held by the complainant, and they be decreed liable for the

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2. SAME. SAME. If a note be transferred for a sum greatly inadequate to its real value, where the purchaser is trading with a man in embarrassed circumstances for a note that is overdue, and with means by which with proper inquiry he could approximate the real value of the note, though there is no evidence of fraud, the suspicious character of such a transaction will limit the holder's recovery to the amount actually paid with interest by him for the same. *Ib.*

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5. SAME. SAME. EQUITY OF REDEMPTION. Where the equity of redemption is not waived in the mortgage, it is error to decree the sale of land, free from redemption, without giving credit of six months upon application of the mortgagee. *Ib.*

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7. PRINCIPAL AND SURETY. JUDGMENT BY MOTION. LOCAL JURISDICTION. The jurisdiction to take judgment by motion in favor of a surety is local and confined to the Court of the county rendering the judgment against his principal, or of the county in which a defendant resides. *Anderson* v. *Binford et al.*, 310.

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9. COURT OF EQUITY. PARTY SEEKING EQUITY MUST DO EQUITY. Osburne and Anderson were partners in the tanning business. Osburne executed a note for $2,000, in the name of Osburne & Anderson, for hides, and procured Binford to sign it as security. The holder recovered judgment against Binford, and Binford took judgment by motion against Osburne & Anderson. Anderson filed a bill to enjoin the execution, upon the ground that he owed Binford nothing, and Binford was not surety for him. The judgment by motion was void for want of proper recitals. But the proof showed that Osburne had given Anderson $2,000 with which to pay his debt. Held, that though the pleadings did not look to relief from this source, yet, as the parties were all before the Court, it would compel the complainant, as a condition to the relief he sought, to pay to Binford the money so received by him, with interest, at the value of United States currency, when received. *Ib.*

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2. SAME. WARRANT, PROOF OF AND ITS RETURN PRIMA FACIE SUFFICIENT. The justice made affidavit that a warrant was returned before him duly executed, upon which he rendered

CERTIORARI—*Continued.*

the judgment; this would throw the burden of disproving the service upon the petitioner. *Ib.*

3. SAME. SAME. PETITION DISMISSED. WHEN. The petitioner, admitting that the judgment was, in fact, rendered, it was not error for the Court to dismiss the petition on proof of service. *Ib.*

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1. PLEADING AND PRACTICE. CROSS-BILL. NEW PARTIES IN. NOT ALLOWED. WHEN. A guardian gave bond and security as such, and afterwards, having received other funds, gave additional bond and security. A bill was filed by the heirs for an account of the money against the guardian and sureties on the first bond, to which answer was made somewhat in the nature of a cross-bill, by the sureties on the first bond seeking to bring the sureties on the second bond before the Court, insisting that they are first liable, as the deficiency grew out of the funds secured by their bond. Held, that the original bill is not filed against the sureties on the second bond. They have never been made parties in any way; there was no issue in the pleadings as between the complainants in that bill and the appellants; no decree sought against them in any way; and therefore they were not liable to any decree on the original bill, nor could the complainants in this way be rightfully compelled by the defendant in the original bill to take such a decree, or be delayed in the prosecution of their rights by the interposition of these third parties into the litigation at the suit of said defendants. *Odom et al.* v. *Owen, Adm'r, et al.*, 446.

2. SAME. SAME. PLEADING AND PRACTICE. "Such a cross-bill need not necessarily be a bill for discovery, specifically, under the section of the Code, but may well be based on any

CHANCERY COURT—*Continued.*

proper matters of equity growing out of the original bill, or connected with it, on which the respondent might be entitled to affirmative relief on a cross-bill, if filed separately. But we think, under the liberal rules of practice known to our State, and carrying out their spirit, the defendants having failed to demur, or otherwise object to the matter alleged for cross-relief, and having answered and gone to a hearing on the same, we can well treat this as an original bill, in the nature somewhat of a cross-bill, perhaps, and settle the rights of the parties as presented by the issues formed between them on these pleadings." *Ib.*

3. GUARDIAN'S BONDS. SURETIES ON. LIABLE TO PRO RATA CONTRIBUTION. When a guardian has given bond as such, and is afterwards required to give an additional bond, (having received other funds). Held, the sureties upon the first and second bond are liable to *pro rata* contribution. *Ib.*

4. CHANCERY PRACTICE. JUDGMENT BY MOTION. ENFORCEMENT OF SALE NOTES. Where a judgment by motion is had in the Chancery Court on notes executed for and sold under its decree, objection to the enforcement of such notes must be taken by petition in the cause or by original bill, and not upon appeal from the judgment on the notes. *Tompkins* v. *Lillard et al.*, 397.

5. SAME. SAME. RECITALS OF JUDGMENTS. The notes were payable to J. M. Tompkins, special commissioner; the judgments were rendered in the name of R. T. Tompkins, but recite upon their face that J. M. Tompkins was dead, and that R. T. Tompkins had been appointed in his place. Held, the judgments are sufficient. *Ib.*

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CLERKS—*Continued.*

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COMPROMISE.

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See TURNPIKE, 7.

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See ADMINISTRATION, 3.

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See LEX LOCI, 11.

CONSTITUTIONAL LAW.

See ELECTION, 6.

See LEX LOCI, 12.

CONTRACT.

See CORPORATIONS, 2.

CONTRACT—EXECUTORY.

See MORTGAGE, 1.

1. EXECUTORY. FAILURE TO RECEIVE THE PROPERTY BY VENDEE. RIGHT OF VENDOR TO RE-SELL OR RESCIND. Where the time of delivery in the sale of cotton was not fixed. Held, if the owner gave the purchaser notice of his readiness to deliver the cotton, and he failed to receive it, after a reasonable time he may give notice and re-sell at the purchaser's risk, or treat the contract as rescinded. *Granberry, Adm'r*, v. *Frierson*, 326.

2. SAME. RE-SALE WITHOUT PROPER CAUSE. DAMAGES. If the sale be made under circumstances as will not authorize the owner to regard the contract as rescinded, and for a better price, in an action for damages the purchaser will be entitled to the difference between the agreed price and that received, less the reasonable cost and expenses of the re-sale. *Ib.*

3. CHARGE OF COURT. ERROR TO RECALL THE JURY AND RE-CHARGE WITHOUT THEIR REQUEST OR THAT OF COUNSEL. It was error to recall the jury and repeat to it a portion of the charge, the jury not asking and the defendant objecting to it. *Ib.*

4. WRITTEN CONTRACT. MERGER OF ORIGINAL LIABILITY. WHEN. Where a particular sum in a specified currency is accepted, by a written agreement, as payment for property, the original liability is merged into the written contract, upon which alone a recovery may be had. *Stroud* v. *Rankin*, 74.

CONTRACT—EXECUTORY—*Continued.*

5. SAME. SAME. MEASURE OF DAMAGES. Where the promise to pay in current bank notes or Confederate Treasury notes, and the latter had ceased to be a currency when the obligation becomes due, then the value of bank notes that pass as currency at the time will be the measure of recovery. *Ib.*

CONTRIBUTION.

See CHANCERY COURT, 3.

CONVERSION.

1. SALE FOR PARTITION. CONVERTS REALTY INTO PERSONALTY. HUSBAND'S MARITAL RIGHTS. The *confirmation* of a sale of land for partition under Chapter 2, Title 2 of the Code, converts the wife's realty into personalty, to which the husband's marital rights attach. In case of wife's death after confirmation, the husband and *his* representatives take the proceeds. *Cowden et al.* v. *Pitts et al.*, 59.

2. SAME. SAME. Section 3338 of the Code has no application to sales made for partition. *Ib.*

CORPORATIONS.

1. BANKING CORPORATIONS. USURIOUS INTEREST. GENERAL LAWS APPLICABLE TO, AS INDIVIDUALS. When a charter is silent as to any violation of the limitation imposed upon the bank in lending money, the general laws against taking unlawful interest are applicable, and the bank in such case can only be treated as a natural person would be for a similar infraction of law; its contracts are void only for the excess had above the legal interest and reasonable exchange. *Perkins* v. *Watson, Trustee*, 173.

2. SAME. SAME. CONTRACTS. PROHIBITION IMPLIED AND EXPRESSED. When contracts are prohibited by statute, the prohibition is sometimes expressed, and at others implied. Whenever the law imposes a penalty for making a contract it impliedly forbids the same, and when a contract is prohibited, either expressly or by implication, it is illegal and can not be enforced. *Ib.*

3. NOTES. ACCOMMODATION ENDORSER. LIABILITY OF. Where a principal discounts a bill at a greater rate of discount than 6 per cent., this will not be such a fraud upon an accommodation endorser as to discharge him from all liability upon the bill. *Ib.*

4. LIABLE FOR ACT OF AGENT. WHEN. MILITARY GOVERNMENT DE FACTO. While the city of Nashville was under military control, its Mayor and City Council constituted a govern-

CORPORATIONS—*Continued.*

ment *de facto*, and the corporation is liable for property taken from individuals, of which it enjoyed the benefits, though its agents, by whose authority the act was done, were not legally elected in pursuance of the city charter. *Ensley et al.* v. *Mayor and City Council of Nashville*, 144.

5. TRESPASS UPON LAND. MEASURE OF DAMAGES. The measure of damages for felling and carrying away trees from a tract of land, is their value as they stood upon the land, and if their removal impaired the value of the land, damages may be had for such injury. *Ib.*

COUNTY COURT.

See TURNPIKE, 2.

COUPONS.

See BONDS, 1.

CRIMINAL LAW.

1. HOMICIDE. MURDER. INDICTMENT FOR AT COMMON LAW AND UNDER THE STATUTE. An indictment in the common law form is sufficient to embrace murder in the first degree. *Poole and Mahaffy* v. *The State*, 288.

2. SAME. SAME. THE WORDS OF THE STATUTE MUST BE EMPLOYED. WHEN. The words "willful," "deliberate," "malicious," and "premeditated," have an independent meaning which is a necessary ingredient of murder in the first degree, all of which must be present, leaving nothing to inference or to be supplied by intendment. In *this* a majority does not concur. *Ib.*

3. SAME. SAME. EVIDENCE. CHARACTER. CROSS-EXAMINATION. In the cross-examination of witnesses touching character, it is incompetent to prove that the witnesses "have heard" certain things or offenses charged to the accused. While it is true that a witness may estimate his own knowledge of the party whose character is in issue, he must do so in connection with his knowledge of his standing in the community in which he lives and did live at the time in which the inquiry may be made; to legalize testimony of character the witness must have heard a sufficient number of persons speak of the assailed to be able to express the well-founded opinion that he believes he knows what a majority would say if called on to speak. Even so when it is intended on cross-examination to assail character, the same rule obtains and the things or offenses offered to be proved must constitute a part of the general character. *Ib.*

CRIMINAL LAW—*Continued.*

4. SAME. SAME. CHARGE OF COURT. The words defining the offense of murder in the first degree have a technical meaning, and it is the duty of the Court trying an indictment for the crime to give such meaning to the jury in the charge, and not merely to use the language. The jury is not presumed to understand it any more than it is presumed to understand any other technical term. While it is not abstract error to say to the jury, "before you can find the defendants guilty before the law, the testimony must be sufficient to exclude every other reasonable hypothesis but the guilt of the defendants." The Court should have explained that the proof must exclude the idea that the deceased might have come to his death in a manner inconsistent with the guilt of the accused; that if the facts generated in its minds a probability that the deceased came to his death by other means they should acquit. That the proof need not show that another was the guilty agent or other means the instrument, but that it would be sufficient if such tendency in the proof created a reasonable doubt of the guilt of the accused. *Ib.*

CROSS-ACTION.

See LEX LOCI, 7.

CROSS-BILL—NEW PARTIES IN.

See CHANCERY COURT, 1.

DAMAGES.

See CONTRACT, 2, 5.

See RAILROAD, 1, 3.

DAMAGES—EXEMPLARY.

See TRESPASS, 1.

DAMAGES—MEASURE OF

See CORPORATION, 5.

DECREES—PLEA OF CORAM NON JUDICE.

See ELECTION, 7.

DEED.

See LIEN, 3, 4, 6.

See TAXES, 1.

DEMAND AND PROTEST.

See BONDS, 2.

DEPOSITION.

See DURESS, 3.

DEPOSITION—NEGLECT TO ENDORSE FILING.

See WILLS, 14.

DUE PROCESS OF LAW.

See TURNPIKE, 7.

DURESS.

1. COMPROMISE. EVIDENCE NOT ADMISSIBLE. WHEN. In the absence of threats of any sort, and there being no special evidence of duress prior to a compromise, it is incompetent to admit testimony; that after the compromise threats had been made against the plaintiff touching the litigation. *B. H. Lynn* v. *Geo. Beatty*, 474.

2. WHAT WILL CONSTITUTE. The threat must be of such a character as to overcome the mind and will and destroy the free agency of a person of ordinary firmness. *Johnson and wife* v. *Roland et al.*, 203.

3. EVIDENCE. DEPOSITION. COMPETENCY OF. The deposition of a witness is admissible in evidence, though taken while the witness was incompetent, provided the witness be competent when his evidence is offered on the hearing of the case. *Ib.*

4. TRUSTEE. EVIDENCE OF ACCEPTANCE. EFFECT OF NON-ACCEPTANCE ON THE LEGAL TITLE. The deed was acknowledged by the bargainor, and properly registered; this would not vest the legal title in the trustee without his acceptance, the *delivery* of a deed of assignment being essential. While the dissent of a trustee to accept the trust may re-vest the legal title in the grantor, yet the beneficiaries may have the trust executed for their benefit by a Court of Chancery. *Ib.*

5. SAME. LEVY ON LAND HELD BY TRUST DEED. Where a valid trust deed exists, no title to property so held can be acquired under subsequent levy. *Ib.*

ELECTION.

1. CONTEST. EFFECT OF. PENDING. A contest of election, by adverse claimant of the office of Chancellor, does not operate to vacate the office pending the contest, nor to confer upon the Governor the power to appoint a Chancellor *pro tempore*. *Gold* v. *Fite*, 237.

2. GOVERNOR. POWER OF APPOINTMENT. APPOINTMENT. WHEN GOOD. Where a vacancy occurs by the death of the Chancellor, the Governor has the power to fill the vacancy by appointment, until the next biennial election, which shall be held more than 30 days after the vacancy. And where the facts exist which authorize the appointment it will be good,

ELECTION—*Continued.*

though the Governor, in making it, acts upon the erroneous assumption that he is filling a vacancy caused by the resignation of a Chancellor who was only *de facto*. *Ib.*

3. OFFICE OF CHANCELLOR. RIGHT TO. WHENCE DERIVED. The right to the office of Chancellor is perfected by the election, and the fact that he died without being commissioned did not render him the less a Chancellor while he lived, and his death created a vacancy in the office which may be filled *pro tempore* by the Governor. *Ib.*
4. CHANCELLOR BY GOVERNOR'S APPOINTMENT. POWERS OF. A Chancellor appointed by the Governor in pursuance of the law is clothed, while he continues in office, with all the powers of a Chancellor elected by the people; and his appointment of Clerk and Master for the constitutional term of that office is valid. *Ib.*
5. CLERK AND MASTER. OFFICE OF. VACANT WHEN. UNDER THE SCHEDULE. The accidental fact that no Chancery Court was held at Carthage after the adoption of the constitution of 1870, until August, 1871, did not have the effect under the second paragraph of the first section of the Schedule of the Constitution, to continue in office a Clerk and Master who had been appointed on the 14th day of February, 1865. But on the contrary, the office was then vacant, and subject to be filled by the Chancellor of the District at that time. *Ib.*
6. RULES AND PRINCIPLES FOR CONSTRUING CONSTITUTIONS AND LAWS. Schedule to Constitution; nature of defence; Jamison on Constitutional Convention, 95; The State *v.* The Clarksville & R. T. P. Co., 2 Sneed, 88; Sedg. on Stat. and Const. Law, 234. *Ib.*
7. DECREES. PLEA OF CORAM NON JUDICE. Where parties fail to interpose the plea of *coram non judice*, the decrees of a Chancellor *de facto* will be binding upon them. *Ib.*

ESTATES—IN REMAINDER.

See WILLS, 1.

ESTOPPEL.

See LIEN, 3.

See WILLS, 10.

EVIDENCE.

See BOUNDARY, 1.

See BILLS AND NOTES, 1, 8.

See DURESS, 1, 3.

See FRAUD, 1.

EVIDENCE—*Continued.*

See PLEADING AND PRACTICE, 2, 18.

See TRESPASS, 1.

See WILLS, 4, 6, 13.

EXECUTOR.

See WILLS, 7, 10.

EXECUTION.

1. MAY ISSUE UPON LOST JUDGMENT WITHOUT SUPPLYING IT. WHEN. Where it appears in substance that a judgment was rendered, and it recites facts sufficient to give the Court jurisdiction, and the judgment has not been reversed and no proceedings are had to re-hear the case upon its merits, alias execution may issue to enforce the same, though the record of the judgment be lost. *Childress* v. *Marks et al.*, 12.

2. APPEAL. BOND. EVIDENCE OF ITS BEING GRANTED. WHEN. The defendants sought to dismiss an appeal, from the Circuit to the Supreme Court, for want of evidence that it was granted; the language is, "which (appeal) is granted upon his giving bond and security for cost." A bond appears executed on the same day, certified as part of the record. Held, the granting an appeal is a judicial act, but the bond is taken by the clerk, and we must take it that the bond was accepted, and therefore the appeal granted. *Ib.*

EXEMPTION.

1. PROPERTY EXEMPT BY LAW. REPLEVIN LIES FOR. WHEN. Where property exempt by law is sold under an execution, replevin will lie for recovery of same. *Harris* v. *Austell*, 148.

2. SAME. SAME. Where the foundation of a judgment is a note made prior to the Act of March, 1860, the defendant in execution can only recover such property as was exempt anterior to said Act. *Ib.*

3. SAME. SAME. Where neither the verdict of the jury nor the judgment of the Court specify the particular animal recovered of the two sued for, in an action of replevin, such verdict and judgment are void for uncertainty. *Ib.*

FORCIBLE ENTRY AND DETAINER.

1. WRIT OF POSSESSION. PRACTICE. An appeal from an interlocutory order of the Circuit Court granting a writ of possession in a case of forcible entry and detainer before final judgment, is premature and will be dismissed. *Carney* v. *Murphy*, 340.

FRAUD—IN SALE OF LAND.

See LEX LOCI, 2, 3.

See BILLS AND NOTES, 1.

See MORTGAGE, 3.

See TRUSTEE, 1.

1. EVIDENCE OF. CONTEMPORANEOUS TRANSACTIONS. In questions of fraud evidence is admissible of other contemporaneous transactions of a similar fraudulent nature, for the purpose of showing interest, and especially is this the case where all the transactions are connected and apparently in concert. *Summers et al.* v. *Howland et al.*, 407.

2 SAME. SAME. The fact that one conveyance made at the same time as others to different parties is shown to be fraudulent, will not be conclusive as to others, but this fact, together with other circumstances, may furnish the ground for weighty inference tending in the same direction, and should be looked to in arriving at a conclusion in such a case. *Ib.*

GARNISHMENT.

See BONDS, 7.

GUARDIAN.

See LIEN, 2.

See TRUST, 2.

1. MUST ACCOUNT FOR PROFITS. WHEN. A guardian purchasing land of his ward, and selling for a profit, when it was his duty to protect such ward, will be held to account for the principal and all profit. *Williams, Adm'r*, v. *Palmer et al.*, 487.

2. APPEAL. DISTINCT RIGHT. CASE NOT BROUGHT UP AS TO ALL. A case involving wholly separate and distinct rights between different parties, depending on different questions, an appeal by one party does not bring up all matters involved in the case. *Ib.*

3. ALLEGATION. NO ISSUE. DECREE. The allegation of an attachment lien existing in another case, which allegation is not put in issue by the answer, and no proof taken therein, can not be made a matter of adjudication. *Ib.*

4. MARRIED WOMAN. SETTLEMENT OF ESTATE. PRACTICE. A guardian may, by bill in Chancery, defeat the claim of his ward's husband to personal property in his charge as such guardian, and have the same settled upon her to her sole and separate use, as the Court may direct. *Murphy* v. *Green et al.*, 403.

INJUNCTION.

See TURNPIKE, 6.

IMPROVEMENTS.

See SALE, 8.

IMPROVEMENT—PERMANENT.

See WILLS, 3.

INSOLVENCY.

See BILLS AND NOTES, 1.

See WILLS, 7.

INSURANCE.

1. POWER TO WAIVE A FORFEITURE IN LIFE INSURANCE POLICY. EXPRESSLY DENIED TO OFFICERS CAN NOT BE EXERCISED. A mere book-keeper, who has no authority to receive an overdue premium on a forfeited policy, and who had never done so except under instructions from the secretary, can not bind the company by so doing. *Nashville Life Ins. Co.* v. *Ewing*, 305.

JUDGMENT—ASSIGNMENT OF.

See STAYOR, 2.

JUDGMENT—BY DEFAULT.

See ATTACHMENT, 1.

JUDGMENT—BY MOTION.

See BILLS AND NOTES, 7.

See CHANCERY COURT, 4, 5.

See SALE OF LAND BY CHANCERY COURT, 3.

1. ATTORNEY'S LIEN FOR FEE. The assignee of a judgment takes the equitable title, subject to a lien which an attorney may have on the same for his reasonable fee. *Cunningham* v. *McGrady*, 141.

2. SAME. WARRANTY OF TITLE IMPLIED. The assignor of a judgment, who sells it for a valuable consideration, gives an implied warranty of title, and if there is a lien or incumbrance on it, he is bound to remove it, unless he relieves himself by contract. *Ib.*

3. CONSTABLE. MOTION AGAINST. RECITALS OF. A judgment based upon a motion deficient in proper recitals, is void, though such motion may refer to a notice already spread upon the minutes embracing the necessary facts. *Johnson and Wife* v. *Bruster*, 99.

LANDLORD AND TENANT.

TENANCY FROM YEAR TO YEAR. WHAT WILL CONSTITUTE. Where a tenant, upon the expiration of a lease for one year, refuses to give possession after notice, but holds over and complies with the condition of the original contract in monthly payments, he becomes a tenant from year to year, and is liable for the entire year's rent, though the property be consumed by fire during his occupancy. *Geo. B. Hibbard* v. *Martha E. Newman, Executrix*, 285.

LEX LOCI CONTRACTUS.

1. Whatever constitutes a good defence by the law of the place where the contract is made, or is to be performed, constitutes a good defence wherever the question may be litigated. The lex loci acts upon the right, and the lex fori upon the remedy. *Lewis* v. *Woodfolk*, 25.

2. FRAUD. Fraud in the inception of a contract is fatal to its enforcement, wherever the same may be litigated. *Ib.*

3. SAME. SAME. IN SALE OF LAND. In the sale of land, if there be no ingredient of fraud, and the party has not secured himself by covenants, he has no remedy even on failure of title. *Ib.*

4. NOTE. INADEQUACY OF CONSIDERATION. Inadequacy of consideration, without warranty of fraud, is no defence to a promissory note. *Ib.*

5. RECOUPMENT. Recoupment is not a matter of set-off arising on an independent contract, but for the purpose of reducing the plaintiff's damages, because he has not complied with the cross obligations under the same contract. *Ib.*

6. SAME. FRAUDULENT MISREPRESENTATIONS. Damages may be recouped for the value, quality or quantity of land when sustained by fraudulent misrepresentations, if susceptible of computation. *Ib.*

7. SAME. CROSS-ACTION. This defense only exists when a cross-action could be maintained. *Ib.*

8. SALE OF LAND IN GROSS. LAW OF LOUISIANA. Where land is sold in gross no action can be maintained for a diminution of price on account of deficiency in quantity. *Ib.*

9. SAME. WARRANTY. EVICTION. LAW OF LOUISIANA. Vendor of land is never liable until the vendee is evicted by some lawful authority. *Ib.*

10. SUCCESSION. LEGAL REPRESENTATIVES OF. LAW OF LOUISIANA. An administrator with will annexed may sue and recover upon a note made "to the order of the legal representatives of the succession" of the testator. *Ib.*

LEX LOCI CONTRACTUS—*Continued.*

11. CONFLICT OF LAWS. Laws of other States are presumed to be the same as that of the State where the suit is brought, until the contrary is shown. *Ib.*

12. CONSTITUTIONAL LAW. COMITY OF STATES. A change in the organic law of Louisiana, which annuls contracts for the sale of slaves in said State prior to the making of such a change, is unconstitutional and void, and will not be recognized in this State, as valid by the comity of States.

13. COMITY OF STATES. HOW FAR THE PRINCIPLE IS TO INFLUENCE THE COURTS OF OTHER STATES. The comity of States is not a positive rule of law; one State can not dictate to another how to construe a contract sought to be enforced in its limits. A reasonable limitation of the rule is, that no community shall suffer prejudice by its comity. *Ib.*

14. WARRANTY OF TITLE. A warranty of title is a covenant that the title is then good in the warrantor, but it is not an undertaking for the future against the *vis major* of the government, by which the then existing title might be destroyed. *Ib.*

15. ATTACHMENT. ANCILLARY. The form of the writ of attachment given in this case was only intended for cases of original attachment, and does not apply to ancillary attachments. Although the absence of proof of publication can not be held fatal to the proceeding, the attachment is void because it does not refer to, describe, and identify the suit, in aid of which it was issued, so as to show upon its face that it forms an adjunct of that particular suit. *Ib.*

LEVY.

See DURESS, 5.

LIEN.

See JUDGMENT, 1.

See GUARDIAN, 3.

See MARRIED WOMAN, 3.

See TRUST, 3.

1. OF JUDGMENT. PRIORITY OF. The lien created by a registered judgment has priority over an unrecorded contract. *Buchanan* v. *Kimes*, 275.

2. GUARDIAN. ACTION, AS SUCH, DOES NOT AFFECT HIS INDIVIDUAL RIGHTS. Where the guardian of minors is made defendant, as such, to a suit involving the title to property, he is not such a party as will render the decree binding on him in an idividual suit. While this would be notice of his ward's claim upon

LIEN—*Continued.*

the land, his rights will not be affected thereby since a creditor may enforce his judgment lien, the adverse title not being registered. *Ib.*

3. SAME. DEED. RECITALS IN. ESTOPPEL. While the recital in a vendor's deed might estop him from denying the purchase of his vendee, yet it can have no effect in communicating a title as against his judgment creditors. *Ib.*

4. SAME. TRUST DEED. RIGHTS OF BENEFICIARIES. Where land is conveyed in trust to secure certain specific debts, the beneficiaries of such trust deed will have a lien on the land so conveyed superior to that of ordinary judgment creditors. *Ib.*

5. VENDOR'S LIEN. RESERVED ON FACE OF DEED. PASSES TO ASSIGNEE OF NOTE. IS AN INCIDENT TO THE DEBT, AND IS NOT LOST BY MERGER OF THE NOTE INTO A JUDGMENT. Where a note is given for the purchase of land which is conveyed to the purchaser by deed retaining a lien to secure the purchase-money, the lien is an incident to the *debt*, and the assignment of the note carries the lien with it to the assignee; nor is it lost by reducing the note to a judgment. *Ib.*

6. DEED. RESERVING LIEN TO SECURE PURCHASE-MONEY PASSES THE LEGAL TITLE TO PURCHASER. SUBJECT TO BE LEVIED ON BY EXECUTION. The deed has the effect to pass the legal title to the purchaser, and it may be levied upon and sold by execution against him. But the purchaser at the execution sale takes the title incumbered with the lien, and the assignee of the note may enforce the lien against the purchaser, at execution sale. *Ib.*

MANDAMUS.

See TURNPIKE, 7.

MARRIED WOMAN.

See CONVERSION, 1.

See GUARDIAN AND WARD, 4.

MARRIED WOMAN—WITNESS.

See WILLS, 17.

1. PRIVY ACKNOWLEDGMENT. DEFECTIVE. WHEN. Where the Clerk's certificate fails to recite that the deed was signed by the married woman, "voluntarily and understandingly," it is defective for such failure; her title is unaffected thereby, such deed carrying with it no legal significance, and the same may be declared void at her instance. *Wright* v. *Dufield*, 218.

MARRIED WOMAN—*Continued.*

2. TITLE BOND. INSUFFICIENT TO PASS THE TITLE OF A MARRIED WOMAN. WHEN. A title bond, though duly executed and certified in every respect, is insufficient to pass the title of a married woman in land. Her title can be divested only by the joint deed of herself and husband, executed in compliance with the forms prescribed by law. Nor can she be forced specifically to execute such agreement. *Ib.*

3. SAME. RESCISION OF SALE. PURCHASE MONEY RESTORED. LIEN ON LAND. PERSONS UNDER DISABILITY. Where a sale is rescinded the vendor will be compelled to restore the purchase money, and the amount paid will be held a lien upon the land, even against a lunatic or married woman; but these conditions will not be imposed if the purchaser was guilty of fraud or imposition in procuring the deed. *Ib.*

4. SAME. SAME. ATTORNEY'S LIEN. Though the lien for the purchase money on the corpus of the property is prior to the solicitor's lien for fees, still the same does not extend to rents and profits accrued, and out of such the counsel's fee will be allowed. *Ib.*

MEASUREMENT.

See NEW COUNTIES, 1, AND 2.

MORTGAGE.

See BILLS AND NOTES, 4, AND 5.

1. OF CROP. MERELY AN EXECUTORY AGREEMENT. WHEN. A writing, supposed to be a mortgage, was executed to secure the payment of money loaned, to be applied in raising a cotton crop, the mortgagor binds himself "to deliver at maturity of the crop so much of the same as will be necessary for the payment of the sum specified in the writing to the mortgagee; conceding that a valid mortgage of a growing crop may be made, the Court held this writing to be merely an executory agreement to deliver cotton enough to pay the debt, but no particular cotton, and remedy upon this instrument would be damages for the mortgagor's failure to deliver the same. *Thurman* v. *Jenkins et al.*, 26.

2. SAME. SAME. Though it be so expressed upon the face of a written instrument, it is not a mortgage where it conveys no specific property, and the mortgagee under such circumstances has no right, either legal or equitable, to the property described, such as may be enforced against an attaching creditor. *Ib.*

MORTGAGE—*Continued.*

3. SAME. SAME. FRAUDULENT CONVEYANCE. Where the mortgagee procures the writing to be done, he is chargeable with knowledge of its contents, and if it recites a false consideration, it is evidence of fraud, and the deed will not stand as security for the real debt. *Ib.*

4. SAME. SAME. SAME. Where future advances are to be secured, this should appear upon the face of the deed or mortgage. *Ib.*

5. PRACTICE IN SUPREME COURT. REMANDING CAUSE. On failure to make proper party, the Supreme Court will in proper cases in aid of substantial right, remand to the Chancery Court to make proper parties. *Ib.*

MOTION—AGAINST CLERKS.

See CLERKS.

See JUDGMENT, 3.

NEGLIGENCE—CONTRIBUTORY.

See RAILROAD, 1, 3.

NEW COUNTIES.

1. MODE OF MEASUREMENT. STRAIGHT LINE RULE ADOPTED. ARTICLE 10, SEC. 4 OF THE CONSTITUTION, AND CH. 27 OF ACT OF SECOND SESSION OF 1869–70, PASSED JUNE 21, CONSTRUED. Where new counties are established, the straight line rule is adopted as the mode of laying them off and ascertaining their proper measurements. *Macon and Smith Counties* v. *Trousdale County*, 1.

2. SAME. SAME. The Act of the Legislature, so far as it merely established the County of Trousdale, is valid; but so far as by the boundaries prescribed it has entrenched upon the counties of Macon and Smith, lessening their constitutional area, it is void. *Ib.*

NEW TRIAL.

1. AFFIDAVIT. COUNSEL'S MISCALCULATION AS TO TIME AND BUSINESS. Where a party and his counsel miscalculate as to the condition of the docket of the Court, and are consequently not present at the trial of the suit, a new trial will not be granted on affidavit of this fact. *Simonton* v. *Buchanan*, 279.

2. SAME. PLEADING AND PRACTICE. INFORMALITIES. REMEDY. Parties will not be allowed, after verdict, to complain of informalities which might have been remedied, if objected to in due time, especially under the circumstances of this case. *Ib.*

NEW TRIAL—*Continued.*

3. PARTY MISLED BY REMARK OF COURT. Where a party has been misled by a remark of the Court as to the time at which his case would stand for trial, and for this reason is unprepared when his case comes on for hearing, a new trial will be granted. *Clark* v. *Jarrett*, 466.

NON-RESIDENT.

See ATTACHMENT, 1.

NOTICE.

See PLEADING AND PRACTICE, 3.

See SHERIFF, 3.

See JUDGMENT, 3.

PARTNERSHIP.

See ACCOUNT, 1.

1. LIABILITY OF FIRM UPON NOTE SIGNED BY ONE OF ITS MEMBERS. Where only one member of a firm signs his individual name to a note, the firm will be bound thereby if they, as partners, made the contract, and the credit was given to them as such. *Puckett* v. *Stokes*, 442.

PERSONS UNDER DISABILITY.

See MARRIED WOMAN, 3.

See TRUST, 2, 3.

PERSONAL PROPERTY.

See WILLS, 2.

PETITION.

See CERTIORARI, 3.

PLEADING AND PRACTICE.

See ATTACHMENT, 4.

See CHANCERY COURT, 2.

See EXEMPTION, 1.

See FORCIBLE ENTRY AND DETAINER, 1.

See GUARDIAN AND WARD, 4.

See MORTGAGE, 5.

See NEW TRIAL, 1, 2.

See SALE OF LAND, 5.

See TRESPASS, 1.

See WILLS, 6, 7, 8.

PLEADING AND PRACTICE—*Continued.*

1. ALLEGATIONS IN BILL. COMPETENT FOR COMPLAINANT TO SHOW AMOUNT DUE HIM. WHEN. PLEADING. PRACTICE. Where the allegations of a bill do not state the exact amount of indebtedness, but allude to various sums which complainant may have to pay, and there is a prayer for general relief, then the complainant may show by proof what the sum due him is, nor is it material that no account was prayed for. *Galloway et al.* v. *Galloway et al.*, 328.

2. SAME. BILL OF REVIEW. SUPREME COURT WILL NOT RE-EXAMINE EVIDENCE UNDER. WHEN. The Supreme Court will not, under a bill of review, re-examine evidence to ascertain whether a decree is sustained by the proof or founded upon improper or insufficient evidence. *Ib.*

TAKING OF ACCOUNT. NOTICE. WANT OF. NOT ERROR TO BE CORRECTED BY BILL OF REVIEW. WHEN. While the want of notice of the taking of an account is matter of exception, it is not error of a character to be corrected by a bill of review. *Ib.*

4. SAME. DEMURRER MAY BE FILED. WHEN. PLEADING. A defendant may file his demurrer, even though a motion to dismiss, containing the same objections as embraced in the demurrer has been disallowed. *Ib.*

5. ATTACHMENT. AFFIDAVIT DEFECTIVE. WHEN. An affidavit for attachment is defective in failing to state the nature of the debt claimed, whether by note, bill of exchange, account or breach of contract. *Willey & Kelley* v. *Riorden & Ward*, 227.

6. SAME. SAME. SUPREME COURT. Where the Circuit Judge refuses improperly to quash, upon defendant's motion, process by which he is brought into Court, and requires the parties to plead, the Supreme Court will correct such error, if apparent upon the record, and render the proper judgment, treating all subsequent proceedings as a nullity. Nor is the filing of a plea in abatement such an appearance as will give the Court jurisdiction of the person, and correct the error. *Ib.*

7. DEMURRER IN CHANCERY. EFFECT OF OVERRULING BEFORE THE CODE. Before the adoption of the Code, after the overruling of a general demurrer to a bill in equity, the defendant might insist upon the same matters in his answer, there being no appeal from such a decree until the final hearing on the merits. *McNairy et al.* v. *Mayor, etc., of Nashville*, 251.

PLEADING AND PRACTICE—*Continued.*

8. SAME. SINCE THE CODE. Since the adoption of the Code, and the allowance of an appeal from the ruling of the Chancellor upon a demurrer, the decree of the Supreme Court upon such an appeal, overruling a demurrer and remanding the cause for plea or answer, is conclusive upon that Court, as well as upon the Court below, in the particular case, as to the matters adjudged by the decree. *Ib.*

9. ADJUDICATIONS OF THE SUPREME COURT. BINDING FORCE. This Court may make adjudications entirely overlooking statutes or decisions governing the case, and while the decisions may not be good authority in another case, nevertheless for that case they are adjudications, and must have full effect as such. *Ib.*

10. CASE IN JUDGMENT. A part of the Tenth Civil District of Davidson County having been added to the city of Nashville, under an Act of the Legislature requiring a preliminary vote of the people of the annexed territory, a bill was filed by about sixty of the citizens thus incorporated, attacking the validity of the proceedings, because of irregularities in the preliminary election; a demurrer to this bill was sustained by the Chancellor, but, on appeal, overruled by the Supreme Court, and the cause remanded, with leave to the complainants to file an amended bill; the bill as amended was answered, proof taken, and, on the final hearing, the Chancellor, *mero motu*, dismissed the bill, because it showed on its face that the incorporation had been completed before the bill was filed, and because the Legislature had legislatively recognized the incorporation before the filing of the bill. Held, that inasmuch as the amended bill only stated more fully the facts of the original bill without changing its substance, and as the former decree of the Supreme Court necessarily determined that there was equity on the face of the bill, the dismissal was erroneous, and this although the points on which the Chancellor based his decision were not brought to the attention of the Supreme Court on the first hearing. *Ib.*

11. NON EST FACTUM. EXCLUSION OF USE OF MICROSCOPE BY JURY. ERROR. EVIDENCE. Where parties consent, signatures not in the record may be submitted to the jury as genuine, for comparison with the signature in controversy, and to aid them in the determination of such a question, microscopes may be used. *Kannon* v. *Galloway*, 231.

12. SAME. SAME. AFFIDAVIT. An affidavit which states that affiant was ignorant of certain witnesses until after verdict, but fails to show that he was unable to procure the testimony

PLEADING AND PRACTIE—*Continued.*

of other experts, who would have proven the same fact, is insufficient. *Ib.*

13. PLEA IN ABATEMENT FOR MISNOMER. A plea in abatement to a misnomer in the original writ, after correction of the name by leave of the Court and filing of plea in bar by defendant, will not be allowed. *N. & C. R. R. Co.* v. *Wade*, 444.

14. PLEA. WHEN BAD. To an action on a note a plea that "the consideration of the note sued on was notes of banks worth at the time not more than —— cents in the dollar." Held, bad. *Griffin et al.* v. *Simmons et al.*, 19.

15. NOTE. WANT OF CONSIDERATION. When a note for $1,000 is given for depreciated paper of the same nominal value, there is not a "partial want" of consideration within the meaning of Sec. 1806 of the Code. *Ib.*

16. SAME. INADEQUACY OF CONSIDERATION. Inadequacy of consideration is distinguished from a total or partial want of consideration. In the absence of fraud the former is no defence to an action upon a contract; the latter is a defence total or *pro tanto* as the case may be. *Ib.*

17. SAME. DISTINCTION BETWEEN INADEQUACY AND PARTIAL WANT OF CONSIDERATION ILLUSTRATED. When the note is not given upon any one consideration which, whether good or not, or whether it fail or not, goes to the whole note at the time it was made; but for two distinct and independent considerations, each going to distinct portions of the note, and one is a consideration which the law deems valid and sufficient to support a contract and the other not, then the contract shall be apportioned. *Ib.*

18. EVIDENCE. ADMISSION. NOT ADMISSIBLE. WHEN. The mere statement of a testator, as to what he was willing to receive on a note, is no discharge or release of any part of the same, and his executors are not bound, it being voluntary and without consideration. *Ib.*

PRINCIPAL AND AGENT.

See CORPORATION, 4.

See INSURANCE, 1.

1. DISCLOSURE OF AGENCY NECESSARY. WHEN. Where a party accepts Confederate money in satisfaction of a judgment assigned to him as agent, without disclosing his agency, the payment is valid, and such satisfaction by the assignee of the judgment can not be set aside at the instance of the assignor. *Dillard* v. *Clements et al.*, 137.

PRINCIPAL AND AGENT—*Continued.*

2. INSTRUCTIONS. MUST OBEY. WHEN. Where cotton has been shipped to a factor, and a bill drawn against the same, with instructions to sell before or at maturity of the bill, the factor must obey the instructions of his principal, and on failure to do so will be held liable for any loss accruing thereby. *Johnson* v. *Wade*, 479.

PRINCIPAL AND SURETY.

See SALE OF LAND, 2.

1. BLANK INDORSEMENT. A note signed in blank by the sureties, and delivered to the principal, authorizes him to fill it up to any amount, and his act, although the amount may exceed their expectations, is binding upon them, if the note came to the hands of an innocent holder before maturity. The note not being negotiable does not alter the case, nor does the fact that a seal was affixed, since the abolishment of private seals. If payable in bank notes the measure of damages will be the value of such notes at maturity. *Frazier et al.* v. *Gains et al.*, 92.

PUBLIC ROAD.

See TURNPIKE, 1.

PUBLIC OFFICERS.

1. LIABILITY AND DUTY OF, IN RELATION TO TRUST FUNDS. Where an officer holding a trust fund converts it to his own use, he is liable for its value at the time of its conversion. *Touchstone et al.* v. *Whittington et al.*, 68.

2. SAME. SAME. Such liability may be discharged in the same currency as received, though depreciated or worthless, where the officer has acted in good faith. The identical bills are not necessary, if the fund has been kept intact in the *same character of security* as received, and as the property of the beneficiary. This decision is confined to Confederate money. *Ib.*

RAILROAD.

1. CONTRIBUTORY NEGLIGENCE. DAMAGES. In a suit for damages against a railroad company for loss of life occasioned by one of its trains, the condition and conduct, the carelessness, recklessness, and the imprudence of the deceased may be considered by the jury in assessing direct pecuniary damages resulting to the party from the injury. *L. & N. R. R. Co.* v. *Mary Conner, Adm'x, et al.*, 382.

RAILROAD—*Continued.*

2. CASE OVERRULED. So much of the case of the L. & N. R. R. Co. *v.* Burke is overruled as applies to the right of an administrator of a person instantly killed, to sue for the use of the wife and children of the deceased, but the overruling is expressly confined to that single point. *Ib.*

3. DAMAGES. NEGLIGENCE. The accident occurred in the company's yard. The following charge is held to be substantially correct: "It is the duty of the engineer to keep a lookout ahead, but not behind, and if he rang the bell or sounded the whistle at the crossing of the street, and there was nothing on the track ahead, he was not required to continue ringing the bell and sounding the whistle. If the plaintiff was on the track where he could be seen, all possible means should have been used to stop the train, but if the plaintiff was concealed, it was not negligence to omit sounding the whistle and ringing the bell." *Moran* v. *The Nashville and Chattanooga Railroad Co.*, 379.

4. SAME. SAME. CHARGE OF COURT ON MEASURE OF DAMAGES. No reversal can be had because the Court below failed altogether to charge the jury upon the measure of damages, when the defendant is found not to be liable at all. *Ib.*

RECEIVER.

See BILLS AND NOTES, 6.

RECOUPMENT.

See LEX LOCI, 5.

REDEMPTION—EQUITY OF.

See BILLS AND NOTES, 5.

See SALE OF LANDS, &c.

1. REMOVAL OF CLOUD FROM TITLE. CHANCERY JURISDICTION. A Court of Chancery has no such jurisdiction as can entertain a bill which seeks to keep a question of redemption open, until a judgment of the Court can be had removing all embarrassments and clouds from the title of property held for redemption. *Alexander et al.* v. *Colcock, McCauley & Molloy*, 282.

RENTS.

See BILLS AND NOTES, 6.

See SALE OF LAND, 6.

REPLEVIN.

See EXEMPTION, 1.

RES JUDICATA.

See SHERIFF, 2.

SALE OF LAND FOR PARTITION.

See CONVERSION, 1.

SALE OF LAND IN GROSS.

See LEX LOCI.

See SALE OF LAND, 9.

SALE OF PERSONAL PROPERTY.

See ADMINISTRATION, 2.

SALE—RECISION OF.

See MARRIED WOMAN, 3.

SALE OF LAND.

See STAYOR, 4.

See TAXES, 1.

See WILLS, 8.

1. UNREGISTERED TITLE BOND IS NO OBSTACLE TO A SALE OF LAND BY EXECUTOR AGAINST VENDOR. A bond for title given upon the sale of land does not pass the legal title to the vendee, and, if unregistered, imposes no impediment to the rights of a judgment creditor of the vendor. *Adcock and wife* v. *Patton & Durham et al.*, 436.

2. SURETIES TO A JUDGMENT. The sureties against whom, and the principal, a bank has recovered judgment, may, by agreement with the bank, deposit their note with the bank's attorney, bid off the land at the sale made under execution issued on the judgment, and then have the note discounted to settle their bid. *Ib.*

3. SALE OF LAND BY CHANCERY COURT. PARTY PROCURING SALE CAN NOT BE RELIEVED OF HIS PURCHASE. WHEN. A party who has procured a sale of land by a Chancery Court, and been allowed to purchase under said sale, can not come into the same Court by bill and ask to be relieved of his purchase on the ground of errors in the proceedings. *Puckett* v. *Jenkins and wife et al.*, 483.

4. SAME. PRESUMPTIONS OF LAW. A party asking the recision of such a sale must prove the errors complained of, as the presumption of law is in favor of the validity of such a sale. *Ib.*

5. SAME. JUDGMENT BY MOTION ON SALE NOTES. PARTIES TO THE ORIGINAL PROCEEDING. NO REVIVOR NECESSARY. WHEN. Where the Clerk of the Chancery Court takes judgment by motion on sale notes for land sold under decrees of the Court, such judgment is only an incidental proceeding, and the fail-

SALE OF LAND—*Continued.*

ure to revive the suit against the representatives of persons who were parties to the original bill will not affect the validity of such a proceeding. *Ib.*

6. SALE OF LAND. REDEMPTION. DEBTOR. PURCHASER. RENT. Where land has been sold, subject to redemption, and the debtor allowed by the purchaser to remain in posession under an agreement to pay rents, the same may be recovered if the debtor fails to redeem. *Miller, Adm'r,* v. *Buchanan,* 390.

7. SALE OF LAND RESCINDED. PURCHASER'S RIGHT TO COMPENSATION FOR IMPROVEMENTS. Smithson purchased land of Inman, with bond for title, to be paid for in four annual installments, and was put in possession, but was to hold at a rent of $300 per annum upon failure to pay the purchase notes, Inman reserving the right to occupy certain rooms for the four years. Inman and Smithson, for their mutual convenience, erected valuable improvements thereon. The contract was rescinded upon Smithson's failure to pay for the land. HELD: Smithson was entitled to the value of such improvements. *Smithson* v. *Inman,* 88.

8. IMPROVEMENTS. VALUE OF. HOW ESTIMATED. In such case the value of the improvements is to be measured by the actual enhanced value of the land at the time defendant re-took possession. *Ib.*

9. EXECUTION SALE OF LAND. SEVERAL PARCELS SOLD IN GROSS. SALE VOID. If two distinct parcels or tracts of land, not contiguous, nor beneficial, the one to the other, in the uses for which they are respectively adapted, be levied and sold in gross—that is, sold altogether in one sale—and purchased by the plaintiff in the execution, such sale is a fraud upon the execution debtor, and *absolutely void. Mays and wife* v. *Wherry,* 133.

SET-OFF.

See ACCOUNT, 1.

SHERIFF.

1. MOTION AGAINST. LIABILITY OF SURETIES. Where a sheriff accepts notes for collection, and fails to take out execution, or make the money on the same, after judgment before a Justice of the Peace, under the circumstances, he is simply an agent for collection, and his sureties are not liable upon his bond for such failure. *State of Tennessee, for use, etc.,* v. *Levi McCallum et al.* 101.

2. SAME. SAME. RES JUDICATA. A judgment on motion in favor of a sheriff precludes a subsequent suit for the same default,

SHERIFF—*Continued.*

where the Court had jurisdiction on the motion to render a judgment against a sheriff. *Ib.*

3. MOTION AGAINST. NOTICE. Where a motion is made against a sheriff for failing to return an execution sent to him from another county, he is entitled to notice, when he is sought to be made liable on the certificate of the Clerk, that he *mailed* the process to the sheriff. Therefore, where the process is delivered to the sheriff, he will not be entitled to such notice. *Lane* v. *Keith*, 189.

4. SAME. SAME. FACTS RECITED IN JUDGMENT. Where upon the face of the judgment it appears, by the *certificate of the Clerk*, that the execution was mailed, then the fact of notice must be shown, or the judgment will be void for want of jurisdiction. *Ib.*

5. SAME. PRACTICE. SURETY, MAY RECOVER. WHEN. A surety on an official bond, who has paid money for his principal as such, may recover the same in an action for money paid to his use. *Ib.*

6. JUDGE'S CHARGE. PRESUMPTION AS TO. If the bill of exceptions fails to set out the Judge's charge, but states "that among other things unexcepted to, he charged the jury as follows," the Supreme Court is bound to presume he charged the law correctly. *Ib.*

STATUTES CITED:

Bills and notes, lost note, 1844, ch. 92, § 1 ..... 415
Forcible entry and detainer, 1869–70, ch. 6 ..... 340
Principal and surety, 1801, ch. 15, § 1 ..... 310
Sale of land, 1849–50, ch. 121 ..... 390
Tax sale, 1844, ch. 92 § 1 ..... 415
Turnpike, 1835 ..... 105

STATUTE OF FRAUDS.

See FRAUD, 3.

1. STATUTE OF FRAUDS. A promise to convey lands in future, though made at the time of taking a conveyance, is within the Statute of Frauds, and void. *Perkins* v. *Cheairs*, 194.

STATUTE OF LIMITATIONS.

See BILL-SINGLE, 1.

1. STAYOR. RELEASE OF. EXTENSION OF TIME. The acceptance by a judgment creditor of the benefits of a deed of trust made by the judgment debtor does not release the stayor upon the judgment, though the time given the trustee to wind up the trust extends beyond the stay. *Wood* v. *McFerrin et al.*, 493.

STATUTE OF LIMITATIONS—*Continued.*

2. ASSIGNMENT OF JUDGMENT. STAYOR MUST PAY FULL AMOUNT. Though the judgment creditor assign his judgment at a large discount, yet the stayor must pay the assignee the full amount. Not in conflict with Petty *v.* Hannum, 2 Hum., 102. *Ib.*

3. EXCEPTIONS TO ANSWER. CLERK AND MASTER TO ACT UPON. Exceptions to an answer must first be brought before the Clerk and Master for his action, then by appeal to the Chancellor. *Ib.*

4. INJUNCTION BOND. SECURITIES. SALE. Where the injunction, in part, is to enjoin the sale of a lot levied upon by execution, the securities upon the bond, though liable for the entire debt enjoined, are entitled to have a decree for a sale of the lot first, and to be made responsible for the balance only. *Ib.*

SUCCESSION.

See LEX LOCI, 10.

SUPREME COURT—ADJUDICATIONS OF BINDING FORCE.

See PLEADINGS AND PRACTICE, 9.

SUPREME COURT—PRACTICE IN.

See BANKRUPTCY, 2.

See PLEADINGS AND PRACTICE, 6.

See PLEADINGS AND PRACTICE, 2.

SURETY.

See CHANCERY COURT, 3.

See SHERIFF, 5.

TAX SALE.

1. REQUISITES OF DEED. It is essential to the validity of a deed from a revenue collector that it should show affirmatively, not only that a sale of the land was in fact made, but that it was at the time and at the place required by the Statute. And where the recitals of the deed show that the sale was had on the day required by law, this will constitute only *prima facie* evidence of the fact. *Thompson* v. *Lawrence*, 415.

2. SAME. SAME. If land be reported for condemnation to the Circuit Court of the same year for which the taxes are due, under these circumstances, the Court will have no jurisdiction to render judgment under the Act of 1835, §§ 4 and 8. *Ib.*

TRESPASS—DAMAGES.

See CORPORATION, 5.

1. EXEMPLARY DAMAGES. EVIDENCE. PRACTICE. In an action of damages for a trespass the defendant pleaded not guilty, on which there was issue, and justification under legal process. The plea of justification was properly demurred to. *Cannon* v. *Overstreet*, 464.

2. SAME. SAME. SAME. The defendant was allowed to prove his good will toward the plaintiff. Held, Such testimony is admissible in *mitigation* of damages. *Ib.*

TRUST DEED.

See LIEN, 3 and 4.

See STAYOR, 1.

TRUST FUNDS.

See PUBLIC OFFICERS, 1, 2.

1. RESULTING TRUST. DOES NOT EXIST. WHEN. Where the husband, for a nominal sum, purchases the reversionary interests in his wife's property from her brothers, promising to settle the same on her in fee, as part consideration, but dies without executing such agreement, the land descends to his heirs, without resulting trust to his widow. *Perkins* v. *Cheairs*, 194.

2. RESULTING TRUST. HOW CREATED. USE OF WARD'S MONEY BY GUARDIAN. A resulting trust can only arise out of the original transaction when title is taken; such a trust does not exist in favor of wards whose money has been applied by their guardian in payment for land, where the title has fixed in such purchaser previous to his guardianship. *McCall* v. *Flippin*, 161.

3. SAME. SAME. NO LIEN IN FAVOR OF WARD. WHEN. When land has been purchased by guardian with minors' funds, no lien exists in their favor, in the absence of resulting trust. *Ib.*

TRUSTEE.

See DURESS, 4.

1. RIGHTS OF BENEFICIARIES TO RECOVER MONEY PAID BY THE TRUSTEE THROUGH MISTAKE. FRAUD. Where a trustee, wrongfully, or by mistake, pays money to a third person, supposing he was relieving the trust property from an incumbrance, he will not thereby be relieved from responsibility in the matter of his trust to the beneficiaries under the deed, and whatever the trustee's rights may be, the beneficiaries,

in the absence of fraud, are entitled to no relief against the party wrongfully receiving the money. *Wasson* v. *Garrett*, 477.

TURNPIKE.

STATEMENT OF CASE: The County Court of Davidson, by virtue of the Act of 1835, ch. 54, Code, § 1277, appointed three superintendents, "to look over the several turnpikes, roads and toll-bridges within the county, and see that the same are kept in such repair as is required by law;" and these superintendents ordered the gates of the White's Creek Turnpike Company to be thrown open, under § 1282 of the Code. The Turnpike Company filed its bill against the commissioners, seeking to enjoin their action in this respect, and admitting that the road was not in such condition as required by the charter, but setting up the Act of the 9th of January, 1865, as a legislative pardon, and alleging compliance with said act, and claiming that neither the County Court nor the superintendents had any legal right to act in the premises. The Court held: *White's Creek Turnpike Company* v. *Marshall*, 104.

1. TURNPIKE. PUBLIC ROAD. COUNTY COURT. COMMISSIONERS. JURISDICTION OF CHANCERY COURT. The Chancery Court had jurisdiction of this case, because complainant had no full or adequate remedy at law. *Ib.*

2. SAME. SAME. COUNTY COURTS. POWER TO APPOINT SUPERINTENDENTS. The County Court has no jurisdiction over turnpikes before forfeiture is declared, except to appoint the superintendents, as required by the Act of 1835, and this only upon the assumption that the Act of 1835 is constitutional and valid, which the Court discusses but declines to decide. *Ib.*

3. SAME. SAME. SAME. Whether the Act of 1835 is constitutional or not, it is no part of the duty of the County Court or superintendents to determine whether or not the turnpike company had complied with the Act of 1865. *Ib.*

4. SAME. SAME. SAME. The Act of 1865 was a legislative pardon to the turnpike company, which had complied with the same, against the penalties of the Act of 1835, or other penalties provided by its charter for allowing the road to get out of repair. *Ib.*

5. SAME. SAME. SAME. The County Court has no power to control the action of the three superintendents appointed by it. *Ib.*

TURNPIKE—*Continued.*

6. SAME. SAME. INJUNCTIONS. DEMURRER. The injunction was properly granted and the demurrer was properly overruled. *Ib.*

7. SAME. MANDAMUS. CONDITIONAL PARDONS. "DUE PROCESS OF LAW." The Court discusses the question of *mandamus*, conditional pardons, "due process of law," incidentally, but rests the decisions upon the above points. *Ib.*

USURY.

See BILLS AND NOTES, 10.

See CORPORATION, 1.

WARRANTY.

See CERTIORARI, 2.

WARRANTY—OF TITLE.

See JUDGMENT, 2.

See LEX LOCI, 9.

1. TITLE. UPON FAILURE OF. VENDEE'S RELIEF. CHANCERY JURISDICTION. Where land is purchased and a bond for title taken with general warranty, the vendor being insolvent and unable to make title, the vendee may by bill in Chancery have the contract rescinded and collection of the notes for purchase-money enjoined. *Puckett* v. *Draper*, 395.

WILLS.

1. CONSTRUCTION OF. AN ESTATE IN REMAINDER CAN NOT BE CHARGED. WHEN. A party who holds a life estate can not charge the estate in remainder unless he be possessed of the absolute power of disposition. *Ballentine* v. *Spear et al.*, 269.

2. SAME. SAME. PERSONAL PROPERTY. The interest of remainder-men in personal property, which is consumed by use, is limited to such as is left at the death of the tenant for life. *Ib.*

3. SAME. SAME. PERMANENT IMPROVEMENTS. Permanent improvements, such as necessasy repairs, etc., will be charged to the tenant for life, when made during the life estate. *Ib.*

4. HOLOGRAPHIC. INSANITY. RULE AS TO. EVIDENCE. Where a person is assumed to have been insane at the time of placing the will among his valuable papers, it will require an equally intelligent act of retaining it in such repository, in a lucid interval, to give it effect as a valid disposition of his property, this being equivalent to a publication; but to say he was

at any time of sound mind and memory, and then retained it among his valuable papers, would be conclusive that he intended it to be his will, is to state the rule too strongly. *Porter et al.* v. *Campbell et al.*, 81.

5. PRACTICE. CHARGE TO JURY. EXPRESSIONS INCORRECT. REVERSIBLE. WHEN. While the principle is a sound one, that a Judge's charge is not to be held erroneous on account of particular expressions, if the principle as given by him with all its qualifications, is substantially correct, yet if the rule as given to the jury when thus taken is not correct, and taken in connection with the facts of the case, is calculated to mislead the jury, this is ground for reversal. *Ib.*

SAME. BURDEN OF PROOF IN INSANITY. ORDER OF COUNSEL'S ARGUMENT. The defendants, claiming the right to have the opening and closing argument, because the burthen of proving insanity was on them, discussed. *Ib.*

7. INSOLVENT PROCEEDINGS. DUTY OF EXECUTOR. PRACTICE. The property, real or personal, of a non-resident decedent, situated or within the jurisdiction of this State at the time of his death, may be administered under our insolvent laws, and this although the estate of the decedent be solvent at the place of his domicile in another State. *Moorehead* v. *Diemer et al.*, 153.

8. SAME. SAME. SALE OF PROPERTY FOR SPECIFIC DEBTS MAY BE SET ASIDE BY CREDITOR. WHEN. The sale of property for the satisfaction of specific debts by the executor, during the first six months after letters of administration, with knowledge of the insolvency of the estate, does not preclude a creditor, standing by for two years, from filing his bill under the insolvent laws of this State for distribution. A creditor of the estate being the purchaser in this case, was allowed to retain the property at cost, or have the same sold for *pro rata* distribution, having paid the full value at time of sale. *Ib.*

9. ISSUE DEVISAVIT VEL NON. JURISDICTION OF CIRCUIT COURT. PRACTICE. The Circuit Court has jurisdiction to try an issue of *devisavit vel non* when the probate has been set aside, and the case certified to that Court. If the original will be not sent up under § 2173 of the Code, the Circuit Court will not be deprived of jurisdiction, but may compel the County Court by *certiorari* or *mandamus* to do his duty. The jurisdiction of a Circuit Court of an issue of *devisavit vel non* is not appellate but original. *Wisener & Brown* v. *Maupin and Wife et al.*, 342.

WILLS—*Continued.*

10. SAME. SAME. EXECUTORS. DUTY OF. ESTOPPEL. Upon an issue *devisavit vel non*, the executors should have the original will in Court for probate, and failure to do so will not entitle them to prevent the trial by their own default, and if they present a copy with which they are satisfied, they are estopped from objecting to a contest made upon the same. *Ib.*

11. SAME. SAME. JURISDICTION OF CHANCERY COURT. The Chancery Court has jurisdiction to set up a supposed or destroyed will, upon proof of its execution and contents, while the Circuit Court may try an issue *devisavit vel non* on a copy of the original, its correctness being acknowledged. *Ib.*

12. SAME. SAME. TESTAMENTARY CAPACITY. The question of testamentary capacity is, "whether the testator, at the time of making the will, knew and comprehended what he was doing." A will is not valid unless the testator intends of his own free will to make such a disposition, and is capable of knowing what he is doing and understanding to whom he is giving his property, and in what proportion, and whom he is depriving of it. *Ib.*

13. SAME. SAME. EVIDENCE. TESTATOR'S KNOWLEDGE OF CONTENTS. Where the will was not read to the testator, and he was illiterate, it must be shown that he knew its contents, and this may be shown by circumstances, and where the testator was old, illiterate and diseased, full and satisfactory proof that he knew the contents of the will is required. *Ib.*

14. DEPOSITION. FILED IN PROPER TIME. CLERK'S NEGLECT TO ENDORSE FILING NOT TO PREJUDICE. WHEN. When the Court is satisfied that a deposition was in fact filed within the proper time, the fact that the Clerk failed to make the proper endorsement on it will not be held to prejudice the interests of the party to be benefited by such deposition. *Ib.*

15. SAME. EVIDENCE. PROVISIONS OF THE WILL. A testator who is qualified may make his will as he pleases, though he disinherits his children. But when the will is attacked upon the ground of undue influence, the provisions of the will may be looked to as evidence whether it was made freely and rationally, or under undue restraint. *Ib.*

16. WITNESS NOT EXEMPT FROM RULE, THOUGH PARTY TO SUIT. EXCEPTIONS IN FAVOR OF EMPLOYED COUNSEL. Though a witness be a party to a suit, he will be equally subject to be put under the rule with other witnesses, and the only exception made is in favor of employed counsel. *Ib.*

WILLS—*Continued.*

17. SAME. SAME. EVIDENCE. WIFE OF TESTATOR INCOMPETENT WITNESS. WHEN. Where the will is attacked upon the ground of fraud or undue influence exerted by the wife while she was married to testator, or upon the ground of unsoundness of mind or capacity to make a will; she is equally incompetent in both cases. *Ib.*

18. WITNESS. TESTIMONY OF AS TO SOUNDNESS OF TESTATOR'S MIND. After a witness had given the facts of his knowledge of and acquaintance with the testator, he was asked: "From these facts, state whether, in your opinion, he was of sound mind and disposing memory?" The answer is: "He was not of sound mind and disposing memory." The Court allowed the answer so far as the statement that he "was not of sound mind," but refused to allow and sustained the exception as to the question of "disposing memory." Held, There was no error in this. *Ib.*

WITNESS.

Exempt from rule, see WILLS, 18.

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